Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PENNY MOORE,
Plaintiff-Appellant/Petitioner,

VS.

THE BOARD OF EDUCATION OF THE JOHNSON CITY SCHOOLS; DR. R. MIKE SIMMONS, SUPERINTENDENT OF THE JOHNSON CITY SCHOOLS,

Defendants-Appellees/Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. At what point in time must an individual with a disability be "otherwise qualified" in order to obtain relief under the Americans of Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794?

2. Does a dismissal hearing for an employee with a property interest in her employment, in which the same individual acts as investigator, charging party, sole witness against the employee, presiding officer at the hearing, and decision maker, satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States for a meaningful hearing?

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DECISION FROM WHICH REVIEW IS SOUGHT

The Petitioner, Penny Moore [hereafter referred to as "Moore"], submits this petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit for review of that Court's decision in *Penny Moore v. The Board of Education of the Johnson City Schools; Dr. Mike Simmons, Superintendent of the Johnson City Schools*, 134 F.3d 781 (6th Cir. 1998)(Appendix A). The decision of the Sixth Circuit was filed on January 21, 1998. Moore filed a timely petition to rehear *en banc*, which was denied on April 23, 1998 (Appendix C).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit by a writ of certiorari in accordance with 28 U.S.C. §1254(1). Moore seeks review of that portion of the decision of the United States Court of Appeals for the Sixth Circuit wherein that Court determined that Penny Moore was not "otherwise qualified" for purposes of the Americans With Disabiiities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 on the basis of occurrences and circumstances which post-date the challenged employment action, namely Moore's discharge from her position as a public school teacher in the Johnson City Schools. Moore also seeks review of that portion of the decision of the Court wherein it was determined that the procedures used to discharge Moore comported with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws." Constitution of the United States, Amendment 14, Section 1.

STATEMENT OF THE CASE

Penny Moore commenced this action on July 18, 1994, in the United States District Court for the Eastern District of Tennessee to challenge her suspension and the ultimate termination of her employment as a teacher in the Johnson City School System. Moore challenged her suspension and dismissal under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 *et seq.* (Appendix D), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (Appendix E). The District Court had jurisdiction under 28 U.S.C. §§1331 and 1343.

Moore holds a Master's Degree and is licensed to teach in the public elementary schools of the State of Tennessee. After serving for three years as a teacher's assistant and an additional year as an intern in the Johnson City School System, Moore was hired in March 1992 to teach second grade at Woodland Elementary School in the Johnson City School System. [Tr. pp. 5-7, 144].[1] Moore completed the spring of 1992 and was re-employed to teach the entire 1992-93 school year at Woodland Elementary School. Moore was again re-employed for the 1993-94 school year. Throughout the time of her employment until she was suspended in November 1993, Moore was regarded by her principal as a capable teacher. [Tr. pp. 7, 8, 13; Plaintiff's Ex.

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[1] This case was tried in the United States District Court for the Eastern District of Tennessee before The Honorable Thomas G. Hull, United States District Judge, without a jury on February 14-16, 1996. The record includes the stenographic transcript of that trial, which will be referred to herein as "[Tr. p. _____]," and exhibits introduced at that trial, referred to as "[Plaintiff's Ex. _____]" or "[Defendants' Ex. _____]."

35]. Neither Moore's principal nor her fellow teachers ever observed her to be under the influence of drugs or alcohol while on duty at Woodland Elementary School. [Tr. pp. 12, 53, 67, 75, 86].

On Friday November 19, 1993, Moore obtained permission from her principal to be out on leave for medical reasons on Monday November 22 through Wednesday November 24. School was closed for Thanksgiving holidays for the remainder of that week. [Tr. pp. 15-16]. Moore and her psychiatrist, Dr. Janet Lewis, had pre-arranged for Moore to be voluntarily admitted to Woodridge Psychiatric Hospital in Johnson City, Tennessee, on November 22, 1993. [Defendants' Ex. 54, pp. 92-93]. Moore had been seeing Kay Kuczynski, a licensed clinical social worker with expertise in education, early childhood development, family violence, and substance abuse, on a regular basis since August 1990. Over the course of her therapy with Dr. Kuczynski, Moore revealed that she had been severely abused, tortured, sexually molested, and sexually tortured from early childhood into her adult years. While abuse at the hands of her father had ceased when Moore left home, the abuse at the hands of her mother continued. In June 1993, Dr. Kuczynski referred Moore to Dr. Janet Lewis for psychiatric treatment and medication. [Tr. pp. 150-58; Defendants' Ex. 54, pp. 54, 98, 107-108]. Dr. Lewis diagnosed Moore as suffering from a mood disorder, a dissociative disorder, a borderline personality disorder, and mixed substance abuse dependence, and also found Moore to suffer symptoms of post-traumatic stress disorder. [Defendants' Ex. 54, p. 13].

On November 22, 1993, while traveling to Woodridge Psychiatric Hospital after obtaining approved leave from her principal, Moore was involved in an early afternoon automobile accident. There were no injuries in the accident, and the damage to the vehicles was minor. [Tr. p. 440]. However, Moore was under the

influence of alcohol at the time of the accident. On the day following the accident, Moore's principal spoke to Superintendent Simmons about Moore. Ellen Stites, the principal, shared with Superintendent Simmons some of the information about Moore's past, including her rape by her estranged husband, her resulting pregnancy, and her abusive relationship with her father. Stites also informed Superintendent Simmons that Moore was a good teacher. [Tr. pp. 17-18]. When Stites later visited Moore in the hospital, Stites told Moore not to worry about her job and to instead worry about getting well. [Tr. pp. 18-20]. Stites expected Moore to return to her teaching position. [Tr. p. 32]. There was no concern expressed by teachers, parents, or other members of the community in general about Moore returning to teach at Woodland Elementary School. [Tr. pp. 22, 54-56, 65-66, 74].

On November 23, while Moore was on approved medical leave, Superintendent Simmons suspended her. [Plaintiffs' Ex. 4]. In the suspension letter, Superintendent Simmons requested a report from Woodridge Psychiatric Hospital and asked that Moore supply "information" as it became available. Superintendent Simmons viewed this request as a demand or directive. [Tr. p. 269; Plaintiff's Ex. 14].

Moore was discharged from Woodridge Psychiatric Hospital on January 5, 1994. [Defendants' Ex. 54, pp. 51-52, 95]. Her discharge diagnosis included polysubstance dependence, dissociative disorder, and mood disorder, all classified as mental disorders under the *Diagnostic and Statistical Manual* used in the psychiatric profession to render psychiatric diagnoses. [Defendants' Ex. 54, pp. 93-97, 112]. Concern over the custody of her children and the uncertainty of her job, issues which arose as a result of her hospitalization for psychiatric treatment, were Moore's primary stressors upon her discharge from the hospital on January 5. [Defendants' Ex. 54, p. 112]. Moore was capable

of functioning effectively as a teacher upon her release from the hospital. [Tr. pp. 161-62]. On February 16, 1994, Dr. Lewis certified that Moore was not disabled from working. [Defendants' Ex. 54. pp. 129-130].

On the same day Moore was released from Woodridge Psychiatric Hospital, Superintendent Simmons wrote another letter suspending Moore without pay. [Plaintiffs' Ex. 5]. In his January 5 suspension letter, Superintendent Simmons sought from Moore a release of all of her medical and psychiatric records. Superintendent Simmons viewed this request for a release by Moore of her medical and psychiatric records as a *directive* with which Moore was expected to comply. [Tr. pp. 269, 350; Plaintiff's Ex. 14]. Superintendent Simmons ultimately found Moore guilty of insubordination because of her failure to supply a release of medical and psychiatric records as he directed on January 5, 1994. [Tr. pp. 269, 310-311; Plaintiff's Exs. 9, 14].

On March 4, 1994, Superintendent Simmons sent two separate letters to Moore. One of the letters notified Moore that her contract as a teacher in the Johnson City School System would not be renewed. The second notified Moore that she would be terminated from her employment under her current contract if the offenses with which Superintendent Simmons was charging her were found true. [Plaintiff's Exs. 8, 9]. On April 27, 1994, Superintendent Simmons presided over Moore's hearing on the charges he had brought against her. [Tr. pp. 275; Plaintiff's Ex. 37]. Simmons began the April 27 hearing by reading into evidence his own summary of events. The information Simmons read was the only evidence offered against Moore at the hearing. [Tr. p. 278; Plaintiff's Ex. 37]. Simmons refused to allow Moore's attorney at that hearing to cross-examine him regarding the evidence he offered or otherwise. [Tr. pp. 278-366; Plaintiff's Ex. 37, pp. 14-17]. On May 13, 1994, Simmons rendered a

decision finding Moore guilty of insubordination for not providing her medical and psychiatric records as directed and for conduct unbecoming a teacher. [Plaintiff's Ex. 14]. All of the considerations Simmons used in arriving at his decision arose directly out of Moore's treatment for a psychiatric disorder and her failure to provide a release of her medical and psychiatric records. Superintendent Simmons advised in his decision that he would uphold Moore's dismissal unless she agreed to provide the medical and psychiatric records she was previously directed to provide. Finally, Superintendent Simmons advised that Moore had no additional redress from his decision since she was a non-tenured teacher. [Plaintiff's Ex. 14].

The District Court found that Moore suffered from several disabilities within the meaning of the Rehabilitation Act and the ADA, and that she was perceived by the defendants as an individual with a psychiatric disability. [Appendix B, p. A-20]. The District Court further found that, because Moore was perceived as an individual with a psychiatric disability, she was indeed discriminated against by being asked to produce more evidence of her competence to return to work than would have been required of a teacher with a non-psychiatric medical problem. [Appendix B, p. A-20]. However, the District Court and the Court of Appeals both rejected Moore's claims under the ADA and the Rehabilitation Act by finding that Moore was not "otherwise qualified" to teach. [Appendix A, p. A-7; Appendix B, p. A-21].

The District Court also rejected Moore's due process claim based on Moore's purported failure to establish that there was no adequate remedy at state law. [Appendix B, p. A-24]. The Sixth Circuit concluded that the District Court erred in applying the *Parratt* line of cases to Moore's case. *See Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). However, the Sixth Circuit held that Moore received all the process she was

due under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (*en banc*). [Appendix A, pp. A-10-A-11].

ARGUMENT

I. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH OTHER DECISIONS OF THE SAME COURT AND DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

Whether An Individual Is "Otherwise Qualified" Is To Be Determined As Of The Time Of The Adverse Employment Decision.

The District Court determined that Penny Moore was not a qualified individual with a disability by finding that she failed to prove she was otherwise qualified to perform her job as a teacher in the Johnson City Schools. The District Court found that there was no evidence offered to establish that Moore was otherwise qualified. However, the District Court's finding in this regard was clearly erroneous. As the District Court did find, the evidence established that Moore "was able to perform all of her professional duties and keep her emotional problems and chaotic personal life separated from her public life" prior to November 22, 1993. [Appendix B, p. A-20]. Of course, Moore was on an approved leave on November 22 in order to have herself admitted to Woodridge Psychiatric Hospital for treatment.

The undisputed testimony of Dr. Kuczynski, Moore's clinical therapist, was that Moore was just as able to perform her duties as a teacher after her release from the hospital on January 5, 1994, as she had been prior to her hospitalization on November 22, 1993. [Tr. pp. 161-62]. On February 16, 1994, Dr. Lewis, Moore's psychiatrist, certified that Moore was no longer disabled from working. Lewis explained that after Moore's release

from the hospital on January 5, 1994, she had concerns about Moore's clinical prognosis, but no concerns about whether Moore was able to teach. [Defendants' Ex. 54, pp. 116-17]. Lewis testified that if Moore carried out appropriate follow-up care in connection with her disabilities, she knew of no reason why Moore could not teach as effectively as she had taught prior to her hospitalization in November 1993. Of course, Moore's suspension from her job was an additional stressor for her as she attempted to engage in recovery from her fragile psychiatric condition.

The testimony of Dr. Kuczynski and Dr. Lewis was undisputed and established that Moore was "otherwise qualified" to teach when she was not hospitalized for treatment of her disabilities. Moore had taught capably for an extended period of time prior to her hospitalization, in spite of her disabilities. And evidence was presented at trial that Moore had successfully worked at another job for over a year during the time she was receiving psychiatric treatment, obtaining leave for that treatment when she was hospitalized. [Tr. p. 79].

It can only be speculated whether Moore's psychiatric problems would have been as extensive and would have required the same amount of treatment had she not been suspended and later discharged by the defendants, since Dr. Lewis' medical testimony was that Moore's loss of her job was a major stressor in her life that contributed to her ongoing psychiatric problems. Even without such speculation, however, undisputed evidence was presented at trial to establish that Moore successfully performed her teaching job for years in spite of her psychiatric problems. There is no evidence from which it could be concluded that Moore could not have performed her job duties with an equal amount of success when she was not hospitalized. And according to Superintendent Simmons, it has been "the standard process" for the Johnson City School System to grant extended

leave to teachers suffering from emotional or psychological problems as an accommodation to allow them to obtain treatment for those problems. [Tr. p. 360]. In the face of Superintendent Simmons' testimony, any need Moore might have had for leave to obtain treatment of her psychiatric disorders would not have prevented her from being "otherwise qualified" to teach.

The "otherwise qualified" and "reasonable accommodation" inquiries are two sides of the same coin. *See Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). A person is a *qualified* individual with a disability if she can perform the essential functions of her job "with or without reasonable accommodation." 42 U.S.C. §12111(8). The Equal Employment Opportunity Commission takes the position that unpaid leave can be a reasonable accommodation. *See* Appendix to 29 C.F.R. §1630.2(o). Courts have agreed that an employer may be required to give a disabled employee leave for medical care and treatment as an accommodation. *See Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996); *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996); *Corbett v. National Products Company*, 4 AD Cases 98, (E.D.Pa. 1995); *Vializ v. New York City Board of Education*, 4 AD Cases 345 (S.D.N.Y. 1995); *Schmidt v. Safeway*, 864 F.Supp. 991 (D.Ore. 1994).

The Sixth Circuit upheld the District Court, although not relying on the same purported failure by Moore to present evidence that she was otherwise qualified. Instead, the Sixth Circuit stated:

> "The following evidence was presented at trial concerning Moore's ability to perform as a second grade teacher. She was arrested for public intoxication and disorderly conduct on May 25, 1994. She was admitted to the Detoxification Rehabilitation Institute in Knoxville, Tennessee, in August and September 1994. She also admitted her drug use to her

> therapist in February 1995, who stated that, 'in 1993 ... she [Moore] began experimenting with Demerol, Opium and Cocaine.' Moreover, it was shown that Moore lost custody of her children after a psychologist determined that she was incapable of caring for them. On the other hand, Moore presented evidence of positive evaluations of her teaching ability before her initial voluntary commitment in November 1993. However, in view of the evidence of Moore's emotional, legal and psychological difficulties, the District Court correctly determined that she was not otherwise qualified to teach." [Appendix A, p. 7].

In reaching this result, the Sixth Circuit ignored the medical evidence that Penny Moore was to teach when she was not hospitalized and ignored the evidence that Moore had taught successfully for three years despite her ongoing disorders. The Sixth Circuit also ignored the fact that regardless of Moore's alleged illegal use of drugs, such use did not prevent her from being a qualified individual with a disability since the Board and Superintendent Simmons did not act on the basis of any such use. *See* 42 U.S.C. §12114(a). By doing so, the Sixth Circuit effectively eliminated the requirement in 42 U.S.C. §12114(a) that the employer must have acted on the basis of such use.

Moore was suspended without pay on January 5, 1994. Moore's dismissal hearing before Superintendent Simmons was held on April 27, 1994. On May 13, 1994, Simmons rendered his decision upholding his dismissal of Moore. In *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376 (6th Cir. 1998), the Sixth Circuit held that the relevant time for determining whether an employee is otherwise qualified, or is a "qualified individual with a disability," is at the time of the employee's discharge. 135 F.3d at 380 (citing *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996)). In *Weiler v. Household Finance Corporation*, 101 F.3d 519 (7th Cir. 1996), the Seventh Circuit also held

that whether a plaintiff meets the otherwise qualified standard under the ADA is to be determined at the time of the challenged employment decision. 101 F.3d at 524. The Second Circuit, on the other hand, stated in *Teahan v. Metro-North Commuter Railroad Company*, 80 F.3d 50 (2d Cir. 1996), that the issue of whether an employee is otherwise qualified as of the date of termination "is forward looking and enables the employer to consider how the employee will perform as compared to non-handicapped individuals." 80 F.3d at 55 (quoting *Teahan v. Metro-North Commuter Railroad Company*, 751 F.2d 511, 521 (2d Cir. 1991).

Here, the Sixth Circuit relied on matters that occurred after the challenged employment decisions in order to find that Moore was not "otherwise qualified" at the time of the challenged employment decision. The Sixth Circuit relied on Moore's arrest for public intoxication and disorderly conduct twelve days *after* Superintendent Simmons notified Moore of her dismissal. The Sixth Circuit relied on Moore's admission to the Detoxification Rehabilitation Institute months after Moore's dismissal. Indeed, the Sixth Circuit used evidence of Moore's efforts to obtain treatment for her disability, after her discharge, as a reason for finding that she was not otherwise qualified at the time of her discharge. While consideration of these later events might be relevant in assessing the remedy for the unlawful discrimination against Moore, these later events are not relevant under applicable precedent in the Sixth and Seventh Circuits for determining whether Moore was otherwise qualified at the time of the challenged employment decisions.

The other facts cited by the Sixth Circuit also fail to support the determination that Moore was not otherwise qualified. Despite all of the evidence to the contrary, the Sixth Circuit chose to rely on one isolated note from a therapist indicating that Moore *may have* admitted to drug use in 1993. Under 42 U.S.C.

§12114(a), even if true, Moore's drug use in 1993 would not exclude her from being otherwise qualified since Superintendent Simmons and the Board took no action against Moore on the basis of any such use. Finally, the Sixth Circuit relied on Moore's loss of custody of her children after her therapist determined she was not capable at that time of caring for her children. The Sixth Circuit relied on this evidence without any critical analysis of the reasons for the therapist's conclusions, including the fact that one of Moore's children was the product of a rape which in itself created certain difficulties for Moore. The same therapist also testified that notwithstanding her loss of custody of her children, Moore was just as able to perform the duties of a teacher after her release from the hospital on January 5, 1994, as she had been prior to her hospitalization on November 22, 1993. [Tr. p. 161-62]. Yet, the Sixth Circuit took no note of this evidence.

In essence, the Sixth Circuit relied on evidence that either had no relevance to Moore's ability to function as a classroom teacher or evidence of occurrences *after* the challenged employment decisions occurred, while ignoring the unrebutted evidence that Moore was capable of teaching when not hospitalized for medical treatment and that leave for hospitalization for medical treatment was an accommodation routinely granted by the Johnson City Schools. In doing so, the Sixth Circuit not only violated the letter and spirit of the Americans with Disabilities Act, it also created a conflict within the Sixth Circuit itself and with at least one other circuit as well.

This is a proverbial case of bad facts making bad law. If Moore's disability were physical instead of mental, the result likely would have been much different. For example, in a hypothetical example Moore could suffer solely from physical disabilities which render her a quadriplegic. As a result of those physical disabilities, she would be unable to maintain custody of

her small children because she could not care for them as a parent must care for a small child on a daily basis. If Moore could, however, effectively provide classroom instruction, her quadriplegia would not of necessity render her unqualified to teach. Use of an illegal narcotic a year earlier, in order to dull the pain of her physical disability, could be added to this example. Yet, if the Board did not discharge her because of that narcotic use a year earlier, that use in and of itself would not disqualify Moore. At the time of the discharge decision, Moore would be otherwise qualified to teach. If, in this hypothetical, Moore's impairment worsened after three months to the point that she required leave to seek medical treatment, that worsening of her impairment after the fact would not prevent her from being otherwise qualified as of the date of the employment decision. If extensive leave were needed at a later date, that leave might affect the remedy in terms of back pay, but it would not relieve the Board and the Superintendent of all liability for having discriminated against Moore at the earlier discharge date.

The only real difference between the facts in this case and the facts in the hypothetical above is that Moore's disabilities in this case were psychiatric disabilities instead of physical disabilities.

Penny Moore suffered from horrible and sometimes unimaginable psychiatric disorders, resulting in symptoms and behaviors which, for those unaccustomed to dealing with psychiatric disabilities, defy explanation. It may well be that some of those occurrences that took place after Moore's discharge must inevitably affect the relief to which she is entitled. However, those circumstances relied upon by the Sixth Circuit do not affect the determination of whether Moore was otherwise qualified on January 5, 1994, when she was suspended without pay, or on May 13, 1994, when she was discharged. To treat the underlying issue of whether Moore was discriminated against because of her disability any differently than in the quadriplegia example above

is to apply the very sorts of stereotypes to psychiatric disabilities which the Americans with Disabilities Act was intended to prevent.

II. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Penny Moore's Pre-Termination Hearing Was Constitutionally Inadequate.

Relying on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (*en banc*), the Sixth Circuit concluded that even though the District Court applied an erroneous due process analysis, the process offered Penny Moore was constitutionally sufficient. [Appendix A, pp. 9-11]. What the Sixth Circuit ignored, however, was the importance in *Duchesne* and, more particularly, in *Loudermill* of the availability of a full, post-termination, adversary, trial-type hearing to the conclusion that a simple right-of-reply hearing would satisfy the requirements for pre-termination due process. *Loudermill, supra*, 470 U.S. at 547; *Duchesne, supra*, 849 F.2d at 1009 (J. Nelson concurring). In *Duchesne*, in fact, the Sixth Circuit acknowledged that there may be cases where a decision-maker is so biased that the *Loudermill* right-of-reply hearing is meaningless, but a full post-termination adversary hearing would ferret out such bias. 849 F.2d at 1008. As the Sixth Circuit acknowledged in other cases, the extent of pre-termination procedures constitutionally required is inextricably intertwined with the extent of the post-termination procedures available for reviewing an erroneous pre-termination decision. *Sutton v. Cleveland Board of Education*, 958 F.2d 1339, 1349 (6th Cir. 1992); *Carter v. Western Reserve Psychiatric Rehabilitation*, 767 F.2d 270, 273 (6th Cir. 1985).

In this case, there was no post-termination review of the facts available for Moore. As a non-tenured teacher, Moore's property interest in her one year contract of employment was left totally in the hands of Superintendent Simmons. She had no right to appeal Simmons' decision to the Board of Education, as Simmons reminded her in his decision. Moreover, she had no right under state law to judicial review of Simmons' decision not to re-employ her. *See Shannon v. Board of Education*, 286 S.W.2d 571 (Tenn. 1956); *Malone v. Shelby County Board of Education*, 773 S.W.2d 256, 259 (Tenn. Ct. of App. 1989). Under these circumstances, where the hearing before Simmons was the only hearing available to Moore, something more than a simple *Loudermill* right-of-reply hearing was constitutionally required.

In *Loudermill* this Court repeatedly confirmed that the existence and nature of post-termination process were critical in determining the scope of pre-termination process required:

> "We have pointed out that '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved *and the nature of the subsequent proceedings.*'" *Loudermill, supra*, 470 U.S. at 545 (emphasis supplied) (citations omitted).
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> * * *
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> "Our holding rests in part on the provision in Ohio law for a full post-termination hearing." *Id.*, 470 U.S. at 546.
>
> * * *
>
> "[T]he existence of post-termination procedures is relevant to the necessary scope of pre-termination procedure." *Id.*, 470 U.S. at 547 n. 12.

These statements in *Loudermill* are consistent with the concept that due process does not mean there is a set of procedures that will apply to every situation. *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

Yet, by applying *Loudermill* and *Duchesne*, where full post-termination administrative review was available, to this case where post-termination review was nonexistent, the Sixth Circuit effectively adopted the *Loudermill* "right-of-reply" procedure as just such a universally applicable procedure for all employment situations. The Sixth Circuit did in this case precisely what this Court cautioned against in carefully explaining how it decided what process was due in *Loudermill*. *See also Gilbert v. Homar*, 520 U.S. _____, 117 S.Ct. 1807, 138 L.Ed.2d 120, 127 (1997); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Even in *Gilbert*, where the Court concluded no pre-suspension hearing was constitutionally required, the availability of a prompt post-suspension hearing was important to the due process analysis and was the subject of a remand to the Third Circuit. *Gilbert, supra*, 138 L.Ed.2d at 128, 130.

In two cases decided since *Loudermill*, this Court has reaffirmed that due process requires a fair trial in a fair tribunal, and that in adjudicative proceedings, due process requires a neutral and detached judge. *See Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994); *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). In a post-termination hearing, there can be no question that these basic due process concepts would apply. The only reason they do not always apply in the pre-termination context is because of the availability of a post-termination proceeding, to review erroneous factual decisions, where these

fundamental due process concepts attach. With no available post-termination proceeding, as here, the only process for Moore was the pre-termination process. Thus, these fundamental requirements of due process applied at the pre-termination stage.

Moore's hearing was presided over by the investigating and charging party. This presiding, investigating, and charging party was also the only witness against Moore, offered the only "evidence" against her, and declared himself as the only witness who could not be cross-examined in the hearing. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987) (disallowing cross-examination of opposing witnesses permitted because hearing was primarily investigative and because later administrative hearing with full cross-examination of witnesses was provided). Simmons then rendered a decision which he declared to be unappealable.

The due process clause is a constitutional guarantee which protects citizens from an ends-justify-the-means approach by government when it takes from those citizens their liberty or property. The essence of due process is fairness. By extending the rationale of *Loudermill* beyond its intended reach, the Sixth Circuit has effectively held that due process requires no measure of fairness. Under this decision, due process in the Sixth Circuit requires nothing more than giving an employee a meaningless opportunity to speak before his property is permanently taken.

CONCLUSION

Penny Moore's case is a difficult one. It is all too easy to do as the defendants did throughout the trial and on appeal and as the Sixth Circuit did in its decision, namely to seize upon events that occurred after Moore's discharge. These events have no bearing on the challenged employment decision, but they do inevitably taint a bystander's view of Penny Moore. The Sixth Circuit's analysis, however, creates dual standards under the Rehabilitation Act and the Americans with Disabilities Act depending on whether the individual suffers from physical disabilities or psychiatric disabilities. The result is directly contrary to the object of the Rehabilitation Act and the Americans with Disabilities Act, namely to ensure that individuals with disabilities are treated fairly and not on the basis of stereotypes. It is important that this Court ensure that individuals with psychiatric disabilities receive no less protection under the ADA than individuals with physical disabilities.

In addition, it is important that this Court reiterate the contours of *Loudermill* and its limited approval of the "right-of-reply" pre-termination hearing for those cases where full post-termination review is available. *See Loudermill, supra*, 470 U.S. at 546-48, 547 n. 12. Otherwise, notwithstanding this Court's more recent decisions in *Weiss* and *Concrete Pipe*, the Sixth Circuit will continue to rely on its own extreme interpretation of *Loudermill* to virtually eliminate the Fourteenth Amendment's requirement of procedural due process.

Because of the disagreement within the Sixth Circuit itself and among other circuits regarding the timing of the "otherwise qualified" analysis, because of the importance of the ADA and Rehabilitation Act issues here for those millions of individuals suffering from psychiatric disabilities, and because of the Sixth Circuit's elimination of all notions of fairness as a concept entailed in due process, contrary to other decisions of this Court, the Court should grant this petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been placed in the United States Mail, postage prepaid to Kent Ericksen Herrin, HERRIN, BOOZE & RAMBO, 515 East Unaka Avenue, P. O. Box 3725, Johnson City, Tennessee, 37602 on this 22nd day of July, 1998.

_____

W. Ovid Collins, Jr.

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0022P (6th Cir.)
File Name: 98a0022p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 96-5700

PENNY MOORE,
Plaintiff-Appellant,

v.

THE BOARD OF EDUCATION OF THE JOHNSON CITY SCHOOLS;
DR. R. MIKE SIMMONS, Superintendent of the
Johnson City Schools,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville.
No. 94-00274—Thomas G. Hull, District Judge.

Argued: September 9, 1997

Decided and Filed: January 21, 1998

Before: KENNEDY, GUY, and SILER, Circuit Judges.

COUNSEL

ARGUED: Richard L. Colbert, CORNELIUS & COLLINS, Nashville, Tennessee, for Appellant. Earl R. Booze, HERRIN, BOOZE & RAMBO, Johnson City, Tennessee, for Appellees. **ON BRIEF:** Richard L. Colbert, Rebecca Wells Demaree, CORNELIUS & COLLINS, Nashville, Tennessee, for Appellant. Earl R. Booze, K. Erickson Herrin, HERRIN, BOOZE & RAMBO, Johnson City, Tennessee, for Appellees.

OPINION

SILER, Circuit Judge. Plaintiff Penny Moore brought this action against the Board of Education of the Johnson City Schools ("Board"), and Dr. R. Mike Simmons, Superintendent (collectively, "Defendants"), under the Americans with Disabilities Act, 29 U.S.C. § 794(a); the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and the Tennessee Teacher Tenure Act, Tenn. Code Ann. §§ 49-5-503(2)(C) and 49-5-504. After a bench trial, the district court granted judgment in favor of the Defendants. For the reasons stated herein, we **AFFIRM.**

I

Moore was employed by the Johnson City School System as a teacher's assistant for three years, then as an intern at Woodland Elementary School for ten months, then, in March 1992 as a replacement for another teacher at Woodland. Upon completion of this partial year, she was chosen to fill a regular second grade teacher's position at the school for the 1992-1993 school year. She was again hired for the 1993-1994 year in the same position. During this entire period she was evaluated positively by her supervisors.

However, unknown to school personnel, Moore was experiencing personal difficulties during this time. These problems

included the arrest of her husband, an alleged rape by her ex-husband, and the loss of custody of her children. She voluntarily entered a psychiatric facility in late November 1993. Instead of informing the school administrators of this decision, she told them that she needed to undergo a blood test. While driving herself to the facility, she was under the influence of alcohol and was involved in an automobile accident that was reported by local news stations.

Learning of the accident and Moore's psychiatric difficulties, Simmons suspended Moore with pay and requested that she provide medical documentation indicating her ability to continue to perform as a classroom teacher. Although she received this request, Moore did not respond. She remained a patient of the facility until January 5, 1994.

After her suspension, Simmons sent Moore a letter changing her suspension to one without pay and directing her to notify him of her willingness to cooperate with his investigation by submitting her medical records to him and undergoing an independent psychiatric evaluation regarding her ability to perform in the classroom. Bryan McCarty, a Tennessee Education Association staff attorney, responded to this letter. He wrote that Moore was ready to return to work at the earliest possible time; that she would submit a letter from Dr. Janet Lewis, her physician, regarding her ability to function as a teacher; but that she was not required to submit her medical and psychiatric records and would not submit to an independent psychiatric evaluation. No letter from Dr. Lewis was ever produced.

On March 3, 1994, McCarty faxed a letter to Simmons requesting that Moore be reinstated. In response, Simmons sent to Moore a letter dated March 4, 1994, which stated that her contract would not be renewed for the 1994-1995 school year. In a second letter dated the same day, Simmons stated that he was

initiating dismissal procedures against Moore for improper conduct, which stemmed from her drunk driving accident on November 22, 1993; for insubordination, by failing to provide the requested documentation concerning her psychiatric condition; and for abandonment of her teaching duties without leave. Moore was offered a hearing before Simmons on these charges. In a third letter, dated March 28, 1994, Simmons charged Moore with conduct unbecoming a member of the teaching profession.

A hearing was set for April 27, 1994, at which Simmons both presented evidence against Moore and presided over the hearing. McCarty had requested that Superintendent Simmons recuse himself because he would be needed as a witness, arguing that due process principles prohibit the same individual from serving as both a witness and presiding officer. Simmons disagreed and declined to step down as presiding officer.

At the hearing Moore and five other witnesses testified on her behalf. These included several teachers from the school and Dr. Kay Kuczinski, a licensed social worker, who testified that she had been treating Moore since August 1990 for depression, anxiety and panic attacks. She also testified that Moore had been prescribed several antidepressants, but did not reveal any of Dr. Lewis's psychiatric diagnoses or that Moore had a substance abuse problem.

Simmons issued his opinion on May 13, 1994, upholding his dismissal of Moore. According to Simmons, Moore was dismissed because of insubordination and improper conduct; the issue of abandonment of teaching duties was dropped. In the opinion, Simmons wrote:

> The school system has a legitimate need under circumstances that so warrant to review a teacher's ability to continue to function in the classroom. I have determined that the events of this case so warranted. The school system

> was not able to consider whether or not Ms. Moore was fit to return to the classroom due to the refusal of Ms. Moore to provide any information with which such a consideration could be made[.] This dismissal is upheld *unless* Ms. Moore agrees to provide previously requested information by the superintendent with which her ability to resume her teaching duties can be considered. It is noted that Ms. Moore states she was not under the impression that she was directed to submit this documentation. Therefore, this decision provides one additional opportunity to do so. (Emphasis in original).

Moore did not provide the requested information and instead filed suit in the United States District Court for the Eastern District of Tennessee. She alleged that the Defendants violated the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Due Process Clause of the United States Constitution. She later amended her complaint to include a count alleging violations of the Tennessee Teacher Tenure Act. This last allegation apparently arose due to her discovery that the Johnson City School Board had erroneously conferred tenure status upon her during its meeting of April 5, 1993.

The district court held a bench trial on all issues presented. Pertinent evidence at trial included proof by the Defendants that Moore was involved in narcotics use and had been arrested during the period after the hearing and before trial. The court found for the Defendants on all issues.

II

A

Section 504 of The Rehabilitation Act of 1973, through which the Americans with Disabilities Act is applied to the states and localities receiving funds from the Federal Government, provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall solely by reason of his or her disability, be excluded from the participation in, or be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance[.]

29 U.S.C. §794(a). Thus, this section requires that Moore prove four separate elements: first, that she is a disabled person under the Act; second, that she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of her disability; third, that the relevant program or activity receives federal financial assistance; fourth, and most importantly to the present matter, that she is otherwise qualified for participation in the program or activity. *See Sandison v. Michigan High Sch. Athletic Assn., Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995).

The district court found that the first three elements of the statute were satisfied by Moore at trial, but concluded that she had failed to prove that she was otherwise qualified to teach. The court stated:

> The evidence establishes that, prior to November 22, 1993, she [Moore] was able to perform all of her professional duties and keep her emotional problems and chaotic personal life separated from her public life. However, Ms. Moore has not proved that she was able to resume her teaching duties after her release from the hospital on January 5, 1994, or at any time prior to the expiration of her 1993-4 contract year. In fact, before her hearing in April, she had had two additional hospitalizations. In the absence of a letter from Dr. Lewis or the report of an independent psychiatric examination, the Court is unable to find that she was "otherwise qualified."

This court reviews the district court's findings of fact for clear error and conclusions of law de novo. *Duncan v. Coffee County*, 69 F.3d 88, 92 (6th Cir. 1995). Moore is to be considered otherwise qualified if she can, with "reasonable accommodation," meet the "necessary requirements" of the program. *Doherty v. Southern College of Optometry*, 862 F.2d 570, 574-75 (6th Cir. 1988).[1]

The following evidence was presented at trial concerning Moore's ability to perform as a second grade teacher. She was arrested for public intoxication and disorderly conduct on May 25, 1994. She was admitted to the Detoxification Rehabilitation Institute in Knoxville, Tennessee in August and September 1994. She also admitted her drug use to her therapist in February 1995, who stated that, "in 1993 . . . she [Moore] began experimenting with Demerol, opium and cocaine." Moreover, it was shown that Moore lost custody of her children after a psychologist determined that she was incapable of caring for them. On the other hand, Moore presented evidence of positive evaluations of her teaching ability before her initial voluntary commitment in November 1993. However, in view of the evidence of Moore's emotional, legal and psychological difficulties, the district court correctly determined that she was not otherwise qualified to teach.

B

Moore also alleges that the pre-termination hearing she was given violated her due process rights. In examining this claim, the district court relied on a particular line of due process cases. *See Parratt v. Taylor*, 451 U.S. 527 (1981); *Sutton v. Cleveland*

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[1]The Circuit Courts of Appeal disagree as to who bears the burden of persuasion in section 504 cases. *See Doherty*, 862 F.2d at 573-74; *Sandison*, 64 F.3d at 1030 n.3. As this case does not require us to resolve this question, we will not address it.

Board of Education, 958 F.2d 1339 (6th Cir. 1992); *Viceroy v. Walton*, 721 F.2d 1062 (6th Cir. 1983). The court interpreted those cases as holding "that a plaintiff claiming a deprivation of property without due process of law does not state a claim of constitutional magnitude unless he or she can show that there is no adequate remedy at state law." The court further found that there was "no reason to suppose she could not have appealed her case to a state court." Thus, given that adequate state remedies were available, the court concluded that Moore received constitutionally adequate process before her dismissal.

Moore contends that the district court's reliance upon the *Parratt* line of cases was in error. She argues that the availability of post-termination remedies are not relevant to this case because the Defendants had ample opportunity to provide her with an adequate pre-termination hearing and failed to do so. *See Zinermon v. Burch*, 494 U.S. 113 (1990); *Macene v. MJW, Inc.* 951 F.2d 700 (6th Cir. 1991); *Mertik v. Blalock*, 983 F.2d 1353 (6th Cir. 1993).

In *Zinermon*, the Supreme Court explained the *Parratt* and *Hudson* cases:

> The reasoning of Parratt and Hudson emphasizes the State's inability to provide predeprivation process because of the random and unpredictable nature of the deprivation, not the fact that only property losses were at stake. In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.

Zinermon, 494 U.S. at 132.

We have adopted this approach. In *Macene*, we held:

> In this Circuit, then, a § 1983 plaintiff may prevail on a procedural due process claim by either (1) demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of property pursuant to a "random and unauthorized act" and that available state remedies would not adquately compensate for the loss.

Macene, 951 F.2d at 706. This case clearly falls in the first category.[2]

We further explained our position in *Mertik*:

> Cases in which a due process challenge is made to deprivations resulting from the enforcement of an established state procedure stand in sharp contrast to Parratt and Hudson cases. In such cases, the actions at issue are not random or unauthorized, and it is both practical and feasible for the state to provide pre-deprivation process to the aggrieved party. A § 1983 plaintiff making this type of claim need not plead or prove the inadequacy of state remedies.

Mertik, 983 F.2d at 1365.

In view of the foregoing, the district court erred in applying *Parratt* to the present case. Moore was required neither to plead nor prove the inadequacy of post-termination state law remedies in order to prevail. Instead, because the termination hearing conducted by Simmons was neither a random nor unauthorized

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[2]The hearing conducted by Simmons was pursuant to Tennessee statute. The pertinent statutory provision he used reads: "[T]he superintendent may dismiss any employee under the superintendent's jurisdiction for incompetence, inefficiency, insubordination, improper conduct or neglect of duty; provided, that no one shall be dismissed without first having been given, in writing, due notice of the charge or charges and an opportunity for defense." Tenn. Code Ann. § 49-2-301(f)(33).

event, but rather was done pursuant to established procedures, we must "evaluate the challenged procedures directly to ensure that they comport with due process." *Macene*, 951 F.2d at 706.

The traditional standard for the constitutionality of a particular procedure focuses on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Moore undisputedly received written notice of the hearing and was given an opportunity to be heard. The pertinent question that remains is whether Simmons's behavior at the hearing deprived Moore of due process. Moore takes issue with the fact that Simmons acted as an investigator, the charging party, the presiding officer at her hearing, and the party responsible for rendering the opinion concerning Moore's termination as a teacher. Moore contends that the totality of the circumstances surrounding her discharge, including Simmon's dual roles as presiding officer and investigator, his unwillingness to be cross-examined, and the finality of the decision, violated her due process rights. Defendants cite *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988)(en banc), where we found no due process violation by allowing a city manager to initiate charges, preside over the employee's pre-termination hearing, testify in the hearing, and render a decision regarding the employee's discharge.

We agree with the Defendants that the process offered Moore was constitutionally sufficient. She received written notice of

the charges against her, as well as an explanation of the Board's evidence, and was offered an opportunity to present her side of the story. This meets the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), and *Duchense*, 849 F.2d at 1007. Simmons's dual roles at the hearing are not fatal to the process. *See Duchesne*, 849 F.2d at 1006 ("The right to respond before the official responsible for the discharge is sufficient.").

C

Moore was apparently granted tenure by the Johnson City Board on April 5, 1993. There is a dispute as to whether the Board acted intentionally or inadvertently in conferring this status upon Moore. If indeed she is a tenured teacher, then she would have increased statutory due process protection before she could be terminated. Tenn. Code Ann. §§ 49-5-511 and 512. The district court found that the Board accidentally conferred tenure upon Moore, and that, in any event, she had not met the requirements of the Tennessee Teacher Tenure Act. Tenn. Code Ann. §§ 49-5-503(2), 49-5-504(a). We review this mixed question of law and fact de novo. *Waxman v. Luna*, 881 F.2d 237, 239 (6th Cir. 1989).

The pertinent portion of § 49-5-503(2)(C) reads, "(2) 'Permanent tenure' applies to any teacher who . . . (C) Has completed a probationary period of three (3) school years or not less than twenty-seven (27) months within the last five-year period, the last year to be employed as a regular teacher[.]" Apparently, Moore contends that she had completed the twenty-seven month probationary period by including the following in her calculus: three years as a teacher's aide; one year as a teacher intern; from March 18, 1992, until the end of the 1991-92 school year as a regular teacher; and the entire 1992-93 school year as a regular teacher. Defendants concede that Moore's time as a regular

classroom teacher which includes the partial 1991-92 school year and the entire 1992-93 school year (totaling approximately eleven months) should be considered. They also will assume *arguendo* that employment as an intern (ten months) should count toward tenure. However, the two parties disagree as to whether Moore's employment as a teacher's aide should be considered. Clearly, if this period counts toward tenure, then Moore has indeed completed the required probationary period.

The question for us is whether time as a teacher's aide should be included toward Moore's probationary period. The case law does not address the issue directly but the language of Tennessee Code Annotated § 49-5-504(a) is helpful. It reads:

> (a) Any teacher, otherwise qualified for 'permanent tenure' status or 'limited tenure' status shall serve three (3) years or not less than twenty-seven (27) months within a five-year period as a probationary teacher before acquiring 'permanent tenure' status or 'limited tenure' status.

The phrase, "probationary teacher," seems to refer only to those individuals that can be classified as teachers. Taking Moore's position, almost any job within the school system, including clerical or janitorial staff, would apply toward tenure as long as that individual was employed as a "regular teacher" for the year immediately preceding tenure. This does not seem to be the intention of the Tennessee legislature. Accordingly, Moore did not qualify for tenure under the statute.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

No. 2:94-CV-274

PENNY MOORE

v.

THE BOARD OF EDUCATION OF THE JOHNSON CITY SCHOOLS and
DR. R. MIKE SIMMONS, Superintendent of the
Johnson City Schools

MEMORANDUM OPINION

This is a wrongful discharge action brought by Penny Moore, a former second grade teacher at the Woodland Elementary School, against the Board of Education of the Johnson City Schools and its Superintendent of Schools, Dr. R. Mike Simmons, in his official capacity. Ms. Moore brings her claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as secured by 42 U.S.C. § 1983. She contends that the defendants discriminated against her on account of her psychiatric handicap by making the production of her medical/psychiatric records a condition of continued employment; that they deprived her of her property right to her contract of employment without constitutionally adequate procedural protections; and that they denied her the termination procedures due to a tenured teacher.

I. THE FACTUAL BACKGROUND

There seems to be little material dispute about the facts giving rise to this lawsuit. For some time prior to November 22, 1993,

Ms. Moore had been undergoing treatment for depression, anxiety and panic attacks with a licensed clinical social worker, Dr. Kay Kuczinsky. In the late spring of 1993, she had also been referred by Dr. Kuczinsky to a psychiatrist, Dr. Janet Lewis. Dr. Lewis had diagnosed Ms. Moore as suffering from a mood disorder, a dissociative disorder, borderline personality disorder, and mixed susbtance dependance and was prescribing various drugs for her, including lithium. Despite these serious psychological problems, the evidence showed that, prior to November 22, 1993, Ms. Moore had functioned well in her teaching duties and was well thought of by her colleagues and principal, Ellen Stites. No one at the school was aware of her psychiatric diagnoses or her substance abuse.

However, in the fall of 1993, a combination of problems in her personal life caused Ms. Moore to reach a breaking point and both her therapists were urging her to enter a psyciatric hospital. During the three-day work week of November 22, 1993, she arranged for a three-day sick leave in order to check into the Woodridge Psychiatric Hospital in Johnson City. She advised her principal, Ellen Stites, that she needed to have her medication (lithium) regulated. While driving to the hospital, in the early afternoon of November 22, 1993, Ms. Moore had an automobile accident involving several cars but no personal injury. There is no question that she was intoxicated at the time; that criminal charges were brought against her; and that the incident was reported on the evening TV news as well as in the next day's newspaper.

When defendant Simmons learned of the accident and Ms. Moore's psychiatric hospitalization, he suspended her, with pay, and required her to provide a report from Woodridge Hospital indicating her ability to function in her teaching position. In his letter of November 23, 1993 [Ex. 4], he also suggested that the Johnson City Schools might require an independent medical

evaluation of her ability to adequately perform in the classroom. Dr. Simmons asked her to "cooperate with this investigation by providing information as it becomes available." Although there is evidence that she received this letter and was in touch with the Tennessee Education Association, (TEA) about how to handle the situation, Ms. Moore did not respond to the letter or cooperate in any way with Dr. Simmons' investigation. She remained a patient of Woodridge Hospital until January 5, 1994.

Apparently by coincidence, on the day of her discharge, Dr. Simmons wrote her a second letter changing her suspension to one without pay and directing her to notify him of her willingness to release her medical and psychiatric records and to undergo an independent examination with regard to her ability to adequately perform in the classroom. [Ex. 5].

Bryan K. McCarty, a TEA staff attorney, responded to Dr. Simmons' second letter on Ms. Moore's behalf. He wrote that she had not been in a position to respond to his previous letter; that she was ready to return to work at the earliest possible time; that she was willing to provide a statement from Dr. Janet Lewis, her physician, regarding her ability to function as a teacher; but that she was unwilling to release her general medical and psychiatric records (which he claimed were unrelated to her past or current ability to function as a classroom teacher) and she was unwilling to submit to an independent medical examination. Mr. McCarty also advised Dr. Simmons that, in his judgment, the school system lacked authority to order such an examination.

Dr. Simmons did not respond to Mr. McCarty's letter or indicate whether a letter from Dr. Lewis would satisfy the School Board's requirements. However, no letter from Dr. Lewis was ever produced. It was later learned that she was unwilling to write that Ms. Moore's clinical prognosis was good, as requested by the TEA, and that, therefore, any letter from her was deemed unhelpful.

On March 3, 1994, Bryan McCarty faxed a letter to Dr. Simmons again indicating that Ms. Moore was ready to resume her teaching duties and requesting her reinstatement. [Ex. 7].

The very next day, Dr. Simmons wrote Ms. Moore that her contract for the 1994-1995 school year would not be renewed for the "overall benefit of the school system and the well-being of our students." [Ex. 8]. In a separate letter of March 4, 1994, Dr. Simmons also advised her that he was initiating dismissal proceedings for the balance of the 1993-1994 school year on the basis of improper conduct (public intoxication, *etc.* which became known within the school community to the extent that it adversely affected her ability to teach), insubordination (with regard to her failure to provide medical/psychiatric records, *etc.*), and abandonment of her teaching duties without leave. [Ex. 9]. Ms. Moore was offered a hearing before Dr. Simmons on these charges. In a third letter, written on March 28, 1994, he charged her with conduct unbecoming a member of the teaching profession. [Ex. 10].

Ms. Moore did request a hearing which was scheduled for April 27, 1994. Bryan McCarty wrote to Mr. Bernard H. Cantor, the School Board's attorney, concerning the parameters of the hearing. He suggested that Dr. Simmons recuse himself because he would be needed as a witness and because, pursuant to *Kendall v. Board of Education of Memphis*, 627 F.2d 1 (6th Cir. 1980), due process required that the same administrator who investigated the matter not be the one to determine guilt or innocence. [Ex. 12].

Mr. Cantor responded that Dr. Simmons would preside and would not be available as a witness. [Ex. 13]. The hearing was held as scheduled on April 27, 1994, and Dr. Simmons did, in fact, preside. He read a prepared statement giving his chronology of events and the reasons why he had initiated dismissal proceed-

ings [Ex. 15] and was not available for cross-examination. That statement, and a copy of Ms. Moore's personnel file, was all the "evidence" produced to support the dismissal.

Ms. Moore and five other witnesses testified on her behalf, including Dr. Kay Kuczinsky. The witnesses from the school testified, as they did in this case, about Ms. Moore's ability as a teacher. Dr. Kuczinsky testified that she had been treating Ms. Moore since August of 1990, for depression, anxiety and panic attacks; that, over the years, Ms. Moore had been prescribed several different antidepressants; that in November of 1993, Ms. Moore was also taking lithium; and that she had had an appointment to admit herself to Woodridge to try to regulate her medication and help her deal with some of her stress. That there had been two, brief subsequent hospitalizations was also mentioned. Dr. Kuczinsky did not reveal any of Dr. Lewis's psychiatric diagnoses or that Ms. Moore had a substance abuse problem. She indicated that she knew of nothing that would keep Ms. Moore from returning to her teaching duties. [Ex. 37, p. 87]. In addition, there was no evidence offered at the hearing that Ms. Moore's drunk driving accident of November 22, 1993, had become known within the school community to the extent that it adversely affected her ability to perform her teaching duties.

On May 13, 1994, Dr. Simmons issued his decision upholding his dismissal on the charges he had preferred against her except for the charge that she had neglected her duties by failing to request extended leave during the period she was suspended. It appears that the dismissal was based on insubordination with regard to her failure to respond to repeated requests for medical documentation rather than improper conduct (public intoxication and driving under the influence of alcohol), because, in discussing his reasons, Dr. Simmons wrote,

> The school system has a legitimate need under circumstances that so warrant to review a teacher's ability to

> continue to function in the classroom. I have determined that the events of this case so warranted. The school system was not able to consider whether or not Ms. Moore was fit to return to the classroom due to the refusal of Ms. Moore to provide any information with which such a consideration could be made . . . .
>
> This dismissal is upheld *unless* Ms. Moore agrees to provide previously requested information by the superintendent with which her ability to resume her teaching duties can be considered. It is noted that Ms. Moore stated she was not under the impression that she was directed to submit this documentation. Therefore, this decision provides one additional opportunity to do so.

Dr. Simmons concluded his letter by indicating that, according to Tennessee statutes, there was no additional redress or specific remedy offered from his ruling. [Ex. 14].

Ms. Moore did not take this last opportunity to provide the requested medical information and, at some point, her termination became final. On July 18, 1994, she filed the instant lawsuit.

Her case was originally pleaded as one for handicap discrimination and a violation of the process due a non-tenured teacher. However, shortly before this case came to trial, counsel for Ms. Moore discovered that, on April 5, 1993, the School Board had voted to confer tenure upon her in the 1993-94 school years. If, in fact, she had been a tenured teacher at the time of her dismissal, the procedural protections to which she was entitled would have been even greater. Her complaint was amended to add a claim that the defendants had violated the procedures for dismissal of a tenured teacher as outlined in Tenn. Code Ann. §§ 49-5-11 and -512.

II. THE HANDICAP DISCRIMINATION CLAIM

Ms. Moore claims that the defendants discriminated against her on account of her handicap (psychiatric/emotional problems) by making the production of her medical/psychiatric files a condition of continued employment. This was discrimination because employees who have been hospitalized for physical rather than psychiatric illness normally are required to produce no more than a certificate from their treating physician indicating their ability to resume their teaching functions. She also argues that from the wording of Dr. Simmons' decision, it must be inferred that the main reason for her discharge was her refusal to release all of her medical and psychiatric records. She takes the position that forced disclosure of this privileged information violates the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.

There is no dispute the defendants are recipients of federal funds and subject to the requirements of Section 504 of the Rehabilitation Act of 1973. They are also employers covered under the Americans with Disabilities Act. In addition, the Court agrees with the plaintiff that Dr. Simmons exceeded his authority in requesting release of her medical and psychiatric records in his letter of January 5, 1994. However, the more limited request in his letter of November 23, 1993, appears to have been appropriate to the circumstances and falls under the "necessity exception" to the ADA.[1] Unfortunately, there is no way to tell, after the fact, whether Dr. Simmons might have been satisfied if Ms. Moore had produced a letter from a treating physician indicating

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[1]A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112 (d)(4)(A).

her ability to resume her teaching functions or had been willing to submit to an independent medical evaluation at the School Board's expense. There is also no way to tell whether his decision to dismiss Ms. Moore turned upon her inappropriate failure to respond to his initial, more narrowly tailored, request or her appropriate refusal to release her medical and psychiatric records.

In order to recover under the ADA, Ms. Moore must prove that she has a "disability", that she is "otherwise qualified", and that she has been subject to discrimination by reason of her disability. The evidence in this case establishes that Ms. Moore does indeed suffer from several disabilities (substance abuse, psychiatric disorders) within the meaning of the ADA. It is also clear that, because she was perceived as a person with a psychiatric disability, she was asked to produce more evidence of her competence to return to her duties than would have been required of a teacher with a medical problem. Whether she was "otherwise qualified" is less clear.

The evidence establishes that, prior to November 22, 1993, she was able to perform all of her professional duties and keep her emotional problems and chaotic personal life separated from her public life. However, Ms. Moore has not proved that she was able to resume her teaching duties after her release from the hospital on January 5, 1994, or at any time prior to the expiration of her 1993-94 contract year. In fact, before her hearing in April, she had had two additional hospitalizations. In the absence of a letter from Dr. Lewis or the report of an independent psychiatric examination, the Court is unable to find that she was "otherwise qualified."

Moreover, under the provision of 42 U.S.C. § 12114 (a), the term "qualified individual with a disability" does not include an employee who is engaging in the illegal use of drugs when the

covered entity acts on the basis of such use. There was evidence in the record upon which the Court could conclude that Ms. Moore was engaging in the illegal use of drugs both before and after her suspension. It does not appear, however, that Dr. Simmons acted on the basis of such use. He certainly had no idea that she had a substance abuse problem at the time he suspended her. At her hearing on April 27, 1994, there was a hint of a drug abuse problem because Ms. Moore indicated that she was going to AA (Alcoholics Anonymous) and NA (Narcotics Anonymous) meetings. However, she testified that she was not using illegal narcotics.

Because the Court FINDS that Ms. Moore has not proven that she was "otherwise qualified," she has not stated a claim for relief under the ADA or the Rehabiliation Act. This part of her claim will be dismissed.

III. THE TENURE QUESTION

It is undisputed that on April 5, 1993, upon the recommendation of Superintendent Simmons, the Board of Education voted to re-elect Ms. Moore to serve as a teacher in the 1993-94 school year and to confer tenure upon her. It is by no means clear how this happened but the Court is confident that it was a clerical error. The mistake in the Board's records was not corrected until February 5, 1996. However, Ms. Moore's letter of reappointment did not confer tenure upon her; she had no reason to expect tenure at that point in her career; and she never relied upon the defendant's mistake. Testimony from Ms. Moore's principal, Ellen Stites, indicates that the decision of whether or not to recommend her for tenure was to have been made in the spring of 1994. From the Court's calculations of Ms. Moore's months of credited services, she would not have qualified at any earlier time. Under the Tennessee Teacher's Tenure Act, Tenn. Code Ann. § 49-5-504, before a teacher qualifies for tenure, she must have served as a probationary teacher for at least twenty-seven

months within the preceding five-year period. Tenure comes by re-employment by the Board *after* the 27 month probationary period has been completed. *See Reed v. Washington County Board of Education*, 756 S.W. 2d 250 (Tenn. 1988). Ms. Moore did not qualify for tenure at the time of the Board's vote and, regardless of the Board's intention, it was incapable of awarding her tenure in April of 1993. Accordingly, the Court FINDS that Ms. Moore was not entitled to the dismissal procedures due to a tenured teacher.

IV. THE DUE PROCESS CLAIM

Ms. Moore's § 1983 claim is that she was deprived, without adequate due process, of a property interest in completing her contract of employment for the school year 1993-1994. It is obvious from the facts that Ms. Moore was given a pre-termination "right of reply hearing" with the essential elements of due process as required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 at 546, 105 S.Ct. 1487, 94 L.Ed 2d 494 (1985). She was given written notice of the charges, an explanation of her employer's evidence, and an opportunity to present her side of the story at a hearing, with the assistance of counsel.

The law, as it has developed from *Loudermill*, and has been interpreted in our circuit in *Duchesne v. Williams*, 849 F.2d 1004, 1008 (6th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989), is that this type of pre-deprivation right-of-reply hearing is consitutionally adequate to protect the property rights of state employees as long as there is an additional post-deprivation remedy. This post-deprivation remedy must be a full, trial-type of hearing before an impartial judge. *See Duchesne* at 1008. It is not clear from these opinions whether the Due Process Clause mandates that the school board itself provide the post-deprivation remedy or whether access to state courts would be sufficient to satisfy constitutional demands. In Ms. Moore case, the school

board did not afforded any post-termination remedy although, presumably, a state court action was always a possibility. If it was constitutionally required to do so, then, technically, the absence of an impartial decision-maker, coupled with the unwillingness of the charging party to be cross-examined at the only available hearing, leads to the conclusion that Ms. Moore was deprived of her due process rights. If the Court reaches this conclusion, then it must find that Ms. Moore was deprived of her contract for the 1993-94 school year without a constitutionally adequate due process hearing, and must award her the balance of her contract wages, or $15,292.50,[2] to be offset by any earnings she may have had during that period of time.

However, separate from the *Loudermill* line of cases is another line of case, starting in the Supreme Court with *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981), and in the Sixth Circuit with *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), which hold that a plaintiff claiming a deprivation of property without due process of law does not state a claim of constitutional magnitude unless he or she can show that there is no adequate remedy at state law. While many of the *Parratt* progeny have to do other forms of property such as licenses, *see* for example, *Watts v. Burkhart*, 854 F.2d 839 (6th Cir. 1988) or *Macene v. MJW, Inc.*, 951 F.2d 700 (6th Cir. 1991), there are wrongful discharge actions in this line of cases. For example, in *Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (6th Cir. 1992), discharged school bus drivers were found to have a due process claim because they had not been given the discharge procedures prescribed for tenured employees by state law.

In our case, it is clear that Ms. Moore *was* accorded the termination procedures offered to non-tenured teachers under the Education Improvement Act of 1991. The proof was that

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[2]This figure is taken from the defendants' stipulations with regard to damages. [Court file Doc. 46].

Dr. Simmons relied upon Tenn. Code Ann. § 49-2-301(f)(33), which reads,

> The superintendent may dismiss any employee under the superintendent's jurisdiction for incompetence, inefficiency, insubordination, improper conduct or neglect of duty; provided, that no one shall be dismissed without first having been given, in writing, due notice of the charge or charges and an opportunity for defense.

Unfortunately, the statute is silent about how to proceed when an employee, once given written notice of the charges against her, requests an evidentiary hearing. It gives no guidance on whether or not the hearing must be before a neutral, detached fact finder and it is silent on whether or not a teacher would have a right of appeal. Nonetheless, it is clear that Ms. Moore received the process to which she was due under this statute and there is no reason to suppose she could not have appealed her case to a state court. In the absence of any proof to the contrary, the Court FINDS that Ms. Moore had an adequate remedy at state law and that, therefore, she has not stated a constitutional claim. Her § 1983 claim will also be dismissed.

An appropriate Order will follow.

ENTER:

/s/Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE
No. 2:94-CV-274
PENNY MOORE
v.
THE BOARD OF EDUCATION OF THE JOHNSON CITY SCHOOLS and
DR. R. MIKE SIMMONS, Superintendent of the
Johnson City Schools

ORDER

This wrongful discharge action came before the Court for a non-jury trial on February 14, 15, and 16, 1996. Penny Moore, a former second grade teacher at the Woodland Elementary School, claimed that the Board of Education of the Johnson City Schools and its Superintendent of Schools, Dr. R. Mike Simmons, violated the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as secured by 42 U.S.C. § 1983, when they terminated her employment.

Pursuant to a memorandum opinion this day passed to the Clerk for filing, judgment is hereby ENTERED in favor of the defendants and the plaintiff will take nothing on her claim.

ENTER:

/s/Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX C

CASE NO. 96-5700

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PENNY MOORE,
Plaintiff/Appellant,

v.

THE BOARD OF EDUCATION OF THE
JOHNSON CITY SCHOOLS;
DR. R. MIKE SIMMONS, Superintendent of the
Johnson City Schools
Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

PETITION TO REHEAR
EN BANC

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REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: whether the Court erred in holding that Moore was not "otherwise qualified" to perform her job as a teacher when it is undisputed that she was qualified both at the time of her suspension without pay and at the time of her termination; and, whether the Court erred in determining that Moore's pre-termination hearing satisfied due process when there was no post-termination review.

/s/Richard L. Colbert
Richard L. Colbert
Attorney of Record for:
Penny Moore, Plaintiff-Appellant

PETITION FOR REHEARING EN BANC

The plaintiff/appellant Penny Moore ["Moore"] submits this brief in support of her petition for a rehearing *en banc* from the decision of this Court on January 21, 1998.[1]

STATEMENT OF THE CASE

Moore commenced this action on July 18, 1994 when she filed a complaint in the United States District Court for the Eastern District of Tennessee challenging her suspension and termination by the defendants and seeking reinstatement of her employment as a teacher in the Johnson City School System. [R. 1: July 18, 1994 Complaint]. Moore challenged her suspension and dismissal under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

After a series of motions the case was finally tried in the United States District Court for the Eastern District of Tennessee before The Honorable Thomas G. Hull, United States District Judge, without a jury on February 14-16, 1996. On April 23, 1996 Judge Hull issued his memorandum opinion and order, dismissing all of Moore's claims and awarding a judgment to the defendants. [R. 69, 70; April 23, 1996 Memorandum Opinion and Order].

On May 22, 1996 Moore filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. [R. 72: May 22, 1996 Notice of Appeal]. The case was argued on September 9, 1997 before the panel of Judges Kennedy, Guy, and Siler. On January 21, 1998 the panel issued a decision affirming the

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[1]In accordance with Rule 14 of the Rules of the United States Court of Appeals for the Sixth Circuit a copy of the opinion sought to be reviewed is attached as Appendix 1 to this petition.

District Court's decision in favor of the defendants Moore seeks a rehearing, *en banc,* on two issues: whether Moore was "otherwise qualified" under the Americans with Disabilities Act; and, whether Moore's pre-termination hearing satisfied the requirements of due process. The panel's opinion contains precedent setting errors on these two issues of public importance.

ARGUMENT

I. THE PANEL ERRED IN DETERMINING THAT MOORE WAS NOT "OTHERWISE QUALIFIED" UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 AND SECTION 504 OF THE REHABILITATION ACT OF 1973.

As this Court recognized in its opinion, both the Americans with Disabilities Act and the Rehabilitation Act require that Moore prove four separate elements in order to prevail:

> "First, that she is a disabled person under the Act; second, that she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of her disability; third, that the relevant program or activity receives federal financial assistance; fourth, and most importantly to the present matter, that she is otherwise qualified for participation in the program or activity." [January 21, 1998, Opinion p. 6].

Both this Court and the District Court found that Moore satisfied the first three elements but concluded that she failed to satisfy the fourth element, namely that she was "otherwise qualified" to perform her duties as a teacher in the Johnson City School System. The evidence relied upon by the panel for this result was (1) that Moore was arrested for public intoxication and disorderly conduct on May 25, 1994; (2) that Moore was admit-

ted to the Detoxification Rehabilitation Institute in Knoxville, Tennessee on August and September 1994; (3) that a therapist note indicated Moore may have admitted to drug use in 1993; and (4) that Moore lost custody of her children for a period of time. This Court also noted, however, that Moore presented evidence that she was capable of performing her functions as a school teacher prior to her initial voluntary commitment for psychiatric treatment in November of 1993.

The determination of whether or not an individual with a disability is "otherwise qualified" should be made at the time the adverse employment action is taken. There was no evidence at trial, and no evidence cited by either the District Court or this Court, that Moore was unable to perform her professional duties either at the time of her suspension without pay on January 5, 1994 or at the time of her pre-termination hearing on April 24, 1994 and dismissal on May 13, 1994. Indeed, the undisputed testimony of Moore's clinical therapist, Dr. Kay Kuczynski, was that Moore was just as able to perform the duties of a teacher after her release from the hospital on January 5, 1994 as she had been prior to her hospitalization on November 22, 1993. [Tr. pp. 161-62]. Kuczynski further testified that she knew of no reason why Moore could not currently function effectively as a teacher. [Tr. p. 164].

In addition to the testimony of Kuczynski, Moore's treating psychiatrist testified that there was nothing to prevent Moore from performing the duties of her usual job as an elementary school teacher after February 16, 1994. [Defendant's Exhibit 54, pp. 129-31]. The psychiatrist, Dr. Janet Lewis, testified that if Moore carried out the appropriate follow-up care in connection with her disabilities, there was no reason why Moore could not teach as effectively as she had taught prior to her hospitalization in November 1993. [Defendants' Exhibit 54, p. 138].

There were three significant adverse actions taken by the defendants against Moore. The first action was when Simmons, summarily suspended Moore on November 23, 1993, because she had been admitted to a psychiatric hospital, and issued what he later described as a "directive" to disclose confidential psychiatric information. The second action was taken by Superintendent Simmons when he suspended Moore without pay on January 5, 1994, the day Moore was released from the hospital, and issued a second "directive" calling for a release of all her medical and psychiatric records. [Tr. pp. 269, 310-311; Plaintiff's Exhibits 9, 14]. The undisputed medical testimony is that Moore was capable of functioning effectively as a teacher upon her release from Woodridge Psychiatric Hospital on January 5, 1994. [Tr. pp. 161-62]. The only conclusion which can be drawn from these facts is that on January 5, 1994, when Moore was suspended without pay from her teaching duties, she was "otherwise qualified" under the Americans with Disabilities Act.

The third adverse action taken against Moore was on May 13, 1994 when Superintendent Simmons terminated Moore from her teaching position. All of the considerations Simmons used in arriving at his decision arose directly out of Moore's treatment for a psychiatric disorder and her failure to provide the medical documentation which he had unlawfully demanded. [Plaintiff's Exhibit 14]. The undisputed medical proof was that as of May 13 1994 Moore was "otherwise qualified" to perform the functions of a teacher in the Johnson City School System. Indeed, the undisputed proof was that Moore was able to teach whenever she was not hospitalized, and that leave for hospitalization was an accommodation routinely given—at least in the case of physical ailments.

It is clear from this Court's January 21, 1998 decision that the panel decided Moore was not "otherwise qualified" based on Moore's condition on May 25, 1994, in September of 1994, and

in February of 1995. [January 21, 1998 Opinion, p. 7]. Consideration of Moore's ability to teach from the time of her suspension without pay through the time of trial may indeed be appropriate in calculating Moore's remedy [i.e. back pay and, possibly, reinstatement]. However it is not appropriate to determine whether or not Moore was "otherwise qualified" based on circumstances long after the discriminatory acts occurred. Disabilities, especially psychiatric disabilities, change in character and severity over time. In every lawsuit there will be a substantial amount of time between the adverse employment action and the trial. An employee who was otherwise qualified when discharged cannot be precluded from recovery because of events *after* her discharge. If that were so, an employer who acted unlawfully could avoid liability by the fortuity of later events.

The importance of when the "otherwise qualified" measure is taken is best illustrated by another example. If a wheelchair-bound individual sought employment and could perform the work sought despite his handicap, the Court would have no difficulty determining that he was "otherwise qualified" for the job he sought. If the potential employer admittedly denied that individual a job solely because he was disabled, the Court would have no difficulty finding in his favor. If that same individual was totally bedridden and therefore unable to work for a time that began a year after he was denied the job in question and ended shortly before the trial of his claim, would the Court hold that he was not "otherwise qualified" and therefore could not recover for the discrimination that he had suffered a year before he was bedridden? Or, would the Court simply limit the relief by denying back pay for the period after the discrimination but before the trial when that individual was bedridden and therefore could not have been working?

The answers to the questions which follow the foregoing example are obvious. And it is those same answers that should

be applied in this case. All of the medical evidence establishes that Penny Moore was "otherwise qualified" at the time the discriminatory acts occurred. Indeed, the only difference between Penny Moore's case and the hypothetical example above is that Penny Moore's disabilities are psychiatric rather than physical. To treat her case any differently than the foregoing example would be treated is to apply the same stereotypes to psychiatric disabilities that the Johnson City Schools applies to those disabilities, the very sorts of stereotypes the Americans with Disabilities Act was intended to prevent.

During the course of relevant events, Moore required some periods of hospitalization. These periods of hospitalization could have been reasonably accommodated by the defendants. Indeed, the defendants themselves testified that it was "the standard process" for the Johnson City School System to grant extended leave to teachers suffering from emotional or psychological problems as an accommodation to allow them to obtain treatment for those problems [Tr. p. 360]. Therefore, any leave which Moore might have required for continuing treatment of psychiatric disorders would have been a reasonable accommodation and would not have prevented her from being otherwise qualified to teach.

These is no question that Penny Moore suffered from serious psychiatric disabilities. The medical evidence was that the symptoms of those psychiatric disabilities were likely exacerbated by the additional stress surrounding the treatment Moore received at the hands of the Johnson City Schools. Still, it cannot be disputed that Moore taught successfully for three years not only in spite of her disabilities, but without her peers even knowing that she suffered from those disabilities. The defendants have not and cannot insist that they suspended and later discharged Moore because of conduct related to her disabilities. Instead, it is abundantly clear that the defendants regarded Penny

Moore as an individual with disabilities and treated her differently, insisting upon a release of records that they had no lawful right to obtain as a condition for Moore to even obtain consideration for reemployment.

In an effort to overcome their evidentiary void and to divert attention from the material facts, the defendants seized upon the records of Penny Moore's psychiatric disorders and related behavior *after* Moore was discharged. It was a trial tactic, and an appellate tactic, designed to divert attention from the real issues in the case by focusing on behavior, regardless of when it occurred, which would cast Penny Moore in as bad a light as possible. Unfortunately, that diversion continues to be successful. While subsequent occurrences may have some bearing on the relief to be granted, occurrences after the discriminatory acts by the defendants have no bearing on the question of whether Penny Moore was otherwise qualified at the time those discriminatory acts took place. Yet, because of the nature of Penny Moore's disabilities and the focus by the defendants on the symptoms of those disabilities, the panel that initially decided this case fell into the trap of looking at matters that bear on remedies only when addressing the more fundamental underlying issue of liability.

Moore has demonstrated that she was "otherwise qualified" to teach both at the time of her suspension without pay on January 5, 1994 and at the time of her termination on May 13, 1994. The District Court's dismissal of her claim under the Americans with Disabilities Act should be reversed, and the panel erred in affirming the District Court.

II. THE PANEL ERRED IN DETERMINING THAT MOORE'S PRE-TERMINATION HEARING WAS CONSTITUTIONALLY SUFFICIENT AND SATISFIED DUE PROCESS.

Relying on *Cleveland Board of Education v Loudermill*, 470 U. S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and *Duchense v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (en banc), the panel concluded that even though the District Court applied an erroneous due process analysis, the process offered Penny Moore was constitutionally sufficient. [January 21, 1998 Opinion pp. 10-11]. However, the panel's uncritical reliance on *Loudermill* and *Duchense* will not withstand scrutiny when the facts here are viewed closely.

In both *Loudermill* and *Duchense*, the availability of a full, post-termination, adversary trial-type hearing was critical to the conclusion that the very basic and simple right-of-reply hearing was sufficient to satisfy the requirements for pre-termination due process. *See Loudermill*, 470 U.S. at 547, *Duchense*, 849 F.2d at 1009 (J. Nelson concurring).

In Moore's case, on the other hand, there was no post-termination trial-type hearing available to review a factually erroneous decision by the Superintendent of the Johnson City Schools. Where there is no such post-termination review available, an employee is entitled to more than simply a *Loudermill* right-of-reply hearing. The extent of pre-termination procedures constitutionally required is inextricably intertwined with the extent of post-termination procedures available for reviewing an erroneous pre-termination decision. *Sutton v. Cleveland Board of Education* ,958 F.2d 1339, 1349 (6th Cir. 1992); *Carter v. Western Reserve Psychiatric Habilitation*, 767 F.2d 270, 273 (6th Cir. 1985).

Without any post-termination review of the facts, Moore had a pre-termination hearing presided over by the investigating and charging party. This presiding, investigating, and charging party was also the only witness against Moore, offered the only "evidence" against her, and declared himself as the only witness

who could not be cross-examined in the hearing. He then rendered a decision that he declared to be unappealable.

Even in *Duchesne*, this Court acknowledged that there may be cases in which the supervisory official hearing the case is so biased that the *Loudermill* "right-of-reply" hearing is meaningless. As this Court then stated, however the "full, post-termination, adversary, trial-type hearing will serve to ferret out bias, pre-text, deception and corruption by the employer in discharging the employee." 849 F.2d at 1008. The panel in this case, relying on *Loudermill* and *Duchesne*, failed to take note that the "full post-termination, adversary, trial-type hearing" which is designed to cure the improprieties in the initial right-of-reply pre-termination hearing was non-existent for Penny Moore. Yet, the panel treated *Loudermill* and *Duchesne* as the end of the inquiry on pre-termination due process.

In two cases decided after *Loudermill* and *Duchesne*, the Supreme Court of the United States has reaffirmed that due process requires a fair trial in a fair tribunal, and that in adjudicative proceedings, due process requires a neutral and detached judge. *See Weiss v. United States*, 510 U.S. ____, 114 S.Ct. ____, 127 L.Ed.2d 1, 15-16 (1994); *Concrete Pipe & Products of California Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. _____, 113 S.Ct. 2264, 124 L.Ed. 2d 539, 560-61 (1993). In a post-termination hearing, there can be no question that these basic due process concepts would apply. The only reason they do not always apply in the pre-termination context is because of the availability of post-termination trial-type proceedings to review erroneous factual decisions. Where there is no such post-termination proceeding, as here, and the only process to be received is the pre-termination process, these fundamental requirements of due process must be applied at the pre-termination stage. Otherwise, these two recent pronouncements by the Supreme Court are so

much wasted verbiage, and where there is no post-termination hearing, the concept of pre-termination due process is utterly meaningless.

The panel here did not consider the utter absence of fairness in the pre-termination hearing Penny Moore received. The panel here did not balance the type of pre-termination hearing received with the type of post-termination hearing, if any, available in deciding whether the requirements of due process were met. Instead, the panel only considered half of the equation. The effect is to declare that anything goes in the pre-termination hearing, regardless of whether there is a post-termination remedy that is sufficient to satisfy the requirements of due process. The panel's decision, if allowed to stand without any consideration of the absence of post-termination remedies, signals an end to the concept of pre-termination due process in the Sixth Circuit.

CONCLUSION

In a recent movie, an actor portraying the President of the United States says, "America is not easy. America is advanced citizenship."

Penny Moore's case is not easy. Her case involves issues of "advanced citizenship." Penny Moore suffered from some horrible and, to some people, unimaginable psychiatric disorders. Some of the symptoms and behaviors resulting from her disorders are in the minds of those of us unaccustomed to dealing with psychiatric disabilities, behaviors which defy explanation. It is all too easy to take a case like Penny Moore's case and, even with the best of intentions, determine the ends to be achieved, and then use the necessary means to justify those ends. However, the Americans with Disabilities Act and the Due Process Clause cannot permit such an approach to Penny Moore's case. The remedial provisions of the ADA and the fundamental constitu-

tional requirement of due process must withstand the tests of those cases with hard facts, like Penny Moore's case.

It may well be that some of those hard facts, occurring after Penny Moore's discharge, must inevitably affect the extent of the relief to which she is entitled. However, under the facts presented at trial and as found by the District Court, Penny Moore is entitled to a judgment in her favor on her claim that the defendants discriminated against her because of her disability in violation of her rights under the Rehabilitation Act of 1973 and the Americans of Disabilities Act of 1990. Moreover, Penny Moore is entitled to a judgment in her favor on her due process claim, holding that the procedure used to terminate her employment did not, in the absence of a full trial-type post-termination remedy, meet the requirements of due process.

For all of these reasons, Penny Moore respectfully requests that this Court grant her petition for rehearing *en banc* and, after briefing and argument, reverse the decision of the panel and the decision of the District Court below and remand the case to the District Court for entry of a judgment in Penny Moore's favor and a determination of the appropriate remedies.

Respectfully submitted,
/s/Richard L. Colbert
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition to Rehear En Banc has been placed in the United States Mail, postage prepaid to Kent Ericksen Herrin, HERRIN, BOOZE & RAMBO, 515 East Unaka Avenue, P.O. Box 3725, Johnson City, Tennessee, 37602 on this _____ day of February, 1998.

/s/Richard L. Colbert
Richard L Colbert

RECOMMENDED FOR FULL - TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0022P (6th Cir.)
File Name: 98a0022p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 96-5700

PENNY MOORE,
Plaintiff-Appellant,

v.

THE BOARD OF EDUCATION OF THE JOHNSON CITY SCHOOLS; DR. R. MIKE SIMMONS, Superintendent of the Johnson City Schools,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville.
No. 94-00274—Thomas G. Hull, District Judge.

Argued: September 9, 1997

Decided and Filed: January 21, 1998

Before: KENNEDY, GUY, and SILER, Circuit Judges.

COUNSEL

ARGUED: Richard L. Colbert, CORNELIUS & COLLINS, Nashville Tennessee, for Appellant. Earl R. Booze, HERRIN, BOOZE & RAMBO, Johnson City, Tennessee, for Appellees. **ON BRIEF:** Richard L. Colbert, Rebecca Wells Demaree, CORNELIUS & COLLINS, Nashville, Tennessee, for Appellant. Earl R. Booze, K. Erickson Herrin, HERRIN, BOOZE & RAMBO, Johnson City, Tennessee, for Appellees.

OPINION

SILER, Circuit Judge. Plaintiff Penny Moore brought this action against the Board of Education of the Johnson City Schools ("Board"), and Dr. R. Mike Simmons, Superintendent (collectively, "Defendants"), under the Americans with Disabilities Act, 29 U.S.C. § 794(a); the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and the Tennessee Teacher Tenure Act, Tenn. Code Ann. §§ 49-5-503(2)(C) and 49-5-504. After a bench trial, the district court granted judgment in favor of the Defendants. For the reasons stated herein, we **AFFIRM**.

I

Moore was employed by the Johnson City School System as a teacher's assistant for three years, then as an intern at Woodland Elementary School for ten months, then, in March 1992 as a replacement for another teacher at Woodland. Upon completion of this partial year, she was chosen to fill a regular second grade teacher's position at the school for the 1992-1993 school year. She was again hired for the 1993-1994 year in the same position. During this entire period she was evaluated positively by her supervisors.

However, unknown to school personnel, Moore was experiencing personal difficulties during this time. These problems included the arrest of her husband, an alleged rape by her ex-husband, and the loss of custody of her children. She voluntarily entered a psychiatric facility in late November 1993. Instead of informing the school administrators of this decision, she told them that she needed to undergo a blood test. While driving herself to the facility, she was under the influence of alcohol and was involved in an automobile accident that was reported by local news stations.

Learning of the accident and Moore's psychiatric difficulties, Simmons suspended Moore with pay and requested that she provide medical documentation indicating her ability to continue to perform as a classroom teacher. Although she received this request, Moore did not respond. She remained a patient of the Facility until January 5, 1994.

After her suspension, Simmons sent Moore a letter changing her suspension to one without pay and directing her to notify him of her willingness to cooperate with his investigation by submitting her medical records to him and undergoing an independent psychiatric evaluation regarding her ability to perform in the classroom. Bryan McCarty, a Tennessee Education Association staff attorney, responded to this letter. He wrote that Moore was ready to return to work at the earliest possible time; that she would submit a letter from Dr. Janet Lewis, her physician, regarding her ability to function as a teacher; but that she was not required to submit her medical and psychiatric records and would not submit to an independent psychiatric evaluation. No letter from Dr. Lewis was ever produced.

On March 3, 1994, McCarty faxed a letter to Simmons requesting that Moore be reinstated. In response, Simmons sent to Moore a letter dated March 4, 1994, which stated that her contract would not be renewed for the 1994- 1995 school year.

In a second letter dated the same day, Simmons stated that he was initiating dismissal procedures against Moore for improper conduct, which stemmed from her drunk driving accident on November 22, 1993; for insubordination, by failing to provide the requested documentation concerning her psychiatric condition; and for abandonment of her teaching duties without leave. Moore was offered a hearing before Simmons on these charges. In a third letter, dated March 28, 1994, Simmons charged Moore with conduct unbecoming a member of the teaching profession.

A hearing was set for April 27, 1994, at which Simmons both presented evidence against Moore and presided over the hearing. McCarty had requested that Superintendent Simmons recuse himself because he would be needed as a witness, arguing that due process principles prohibit the same individual from serving as both a witness and presiding officer. Simmons disagreed and declined to step down as presiding officer.

At the hearing Moore and five other witnesses testified on her behalf. These included several teachers from the school and Dr. Kay Kuczinski, a licensed social worker, who testified that she had been treating Moore since August 1990 for depression, anxiety and panic attacks. She also testified that Moore had been prescribed several antidepressants, but did not reveal any of Dr. Lewis's psychiatric diagnoses or that Moore had a substance abuse problem.

Simmons issued his opinion on May 13, 1994, upholding his dismissal of Moore. According to Simmons, Moore was dismissed because of insubordination and improper conduct; the issue of abandonment of teaching duties was dropped. In the opinion, Simmons wrote:

> The school system has a legitimate need under circumstances that so warrant to review a teacher's ability to continue to function in the classroom. I have determined

> that the events of this case so warranted. The school system was not able to consider whether or not Ms. Moore was fit to return to the classroom due to the refusal of Ms. Moore to provide any information with which such a consideration could be made[.] This dismissal is upheld *unless* Ms. Moore agrees to provide previously requested information by the superintendent with which her ability to resume her teaching duties can be considered. It is noted that Ms. Moore states she was not under the impression that she was directed to submit this documentation. Therefore, this decision provides one additional opportunity to do so. (Emphasis in original).

Moore did not provide the requested information and instead filed suit in the United States District Court for the Eastern District of Tennessee. She alleged that the Defendants violated the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Due Process Clause of the United States Constitution. She later amended her complaint to include a count alleging violations of the Tennessee Teacher Tenure Act. This last allegation apparently arose due to her discovery that the Johnson City School Board had erroneously conferred tenure status upon her during its meeting of April 5, 1993.

The district court held a bench trial on all issues presented. Pertinent evidence at trial included proof by the Defendants that Moore was involved in narcotics use and had been arrested during the period after the hearing and before trial. The court found for the Defendants on all issues.

II

A

Section 504 of The Rehabilitation Act of 1973, through which the Americans with Disabilities Act is applied to the states and

localities receiving funds from the Federal Government, provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall solely by reason of his or her disability, be excluded from the participation in, or be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance[.]

29 U.S.C. §794(a). Thus, this section requires that Moore prove four separate elements: first, that she is a disabled person under the Act; second, that she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of her disability; third, that the relevant program or activity receives federal financial assistance; fourth, and most importantly to the present matter, that she is otherwise qualified for participation in the program or activity. *See Sandison v. Michigan High Sch. Athletic Assn., Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995).

The district court found that the first three elements of the statute were satisfied by Moore at trial, but concluded that she had failed to prove that she was otherwise qualified to teach. The court stated:

> The evidence establishes that, prior to November 22, 1993, she [Moore] was able to perform all of her professional duties and keep her emotional problems and chaotic personal life separated from her public life. However, Ms. Moore has not proved that she was able to resume her teaching duties after her release from the hospital on January 5, 1994, or at any time prior to the expiration of her 1993-4 contract year. In fact, before her hearing in April, she had had two additional hospitalizations. In the absence of a letter from Dr. Lewis or the report of an independent

psychiatric examination, the Court is unable to find that she was "otherwise qualified."

This court reviews the district court's findings of fact for clear error and conclusions of law de novo. *Duncan* v.*Coffee County*, 69 F.3d 88, 92 (6th Cir. 1995). Moore is to be considered otherwise qualified if she can, with "reasonable accommodation," meet the "necessary requirements" of the program. *Doherty v. Southern College of Optometry*, 862 F.2d 570, 574-75 (6th Cir. 1988).[1]

The following evidence was presented at trial concerning Moore's ability to perform as a second grade teacher. She was arrested for public intoxication and disorderly conduct on May 25, 1994. She was admitted to the Detoxification Rehabilitation Institute in Knoxville, Tennessee in August and September 1994. She also admitted her drug use to her therapist in February 1995, who stated that, "in 1993 . . . she [Moore] began experimenting with Demerol, opium and cocaine." Moreover, it was shown that Moore lost custody of her children after a psychologist determined that she was incapable of caring for them. On the other hand, Moore presented evidence of positive evaluations of her teaching ability before her initial voluntary commitment in November 1993. However, in view of the evidence of Moore's emotional, legal and psychological difficulties, the district court correctly determined that she was not otherwise qualified to teach.

B

Moore also alleges that the pre-termination hearing she was given violated her due process rights. In examining this claim,

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[1]The Circuit Courts of Appeal disagree as to who bears the burden of persuasion in section 504 cases. *See Doherty*, 862 F.2d at 573-74; *Sandison*, 64 F.3d at 1030 n.3. As this case does not require us to resolve this question, we will not address it.

the district court relied on a particular line of due process cases. *See Parratt v. Taylor*, 451 U.S. 527 (1981); *Sutton v. Cleveland Board of Education*, 958 F.2d 1339 (6th Cir. 1992); *Viceroy v. Walton*, 721 F.2d 1062 (6th Cir. 1983). The court interpreted those cases as holding "that a plaintiff claiming a deprivation of property without due process of law does not state a claim of constitutional magnitude unless he or she can show that there is no adequate remedy at state law." The court further found that there was "no reason to suppose she could not have appealed her case to a state court." Thus, given that adequate state remedies were available, the court concluded that Moore received constitutionally adequate process before her dismissal.

Moore contends that the district court's reliance upon the *Parratt* line of cases was in error. She argues that the availability of post-termination remedies are not relevant to this case because the Defendants had ample opportunity to provide her with an adequate pre-termination hearing and failed to do so. *See Zinermon v. Burch*, 494 U.S. 113 (1990); *Macene v. MJW, Inc.* 951 F.2d 700 (6th Cir. 1991); *Mertik v. Blalock*, 983 F.2d 1353 (6th Cir. 1993).

In *Zinermon*, the Supreme Court explained the *Parratt* and *Hudson* cases:

> The reasoning of Parratt and Hudson emphasizes the State's inability to provide predeprivation process because of the random and unpredictable nature of the deprivation, not the fact that only property losses were at stake. In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.

Zinermon, 494 U.S. at 132.

We have adopted this approach. *In Macene*, we held:

In this Circuit, then, a § 1983 plaintiff may prevail on a procedural due process claim by either (1) demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights; or (2) by proving that the defendants deprived him of property pursuant to a "random and unauthorized act" and that available state remedies would not adequately compensate for the loss.

Macene, 951 F.2d at 706. This case clearly falls in the first category.[2]

We further explained our position *in Mertik:*

> Cases in which a due process challenge is made to deprivations resulting from the enforcement of an established state procedure stand in sharp contrast to Parratt and Hudson cases. In such cases, the actions at issue are not random or unauthorized, and it is both practical and feasible for the state to provide pre-deprivation process to the aggrieved party. A § 1983 plaintiff making this type of claim need not plead or prove the inadequacy of state remedies.

Mertik, 983 F.2d at 1365.

In view of the foregoing, the district court erred in applying *Parratt* to the present case. Moore was required neither to plead nor prove the inadequacy of post-terrmnation state law remedies in order to prevail. Instead, because the termination hearing conducted by Simmons was neither a random nor unauthorized event, but rather was done pursuant to established procedures,

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[2]The hearing conducted by Simmons was pursuant to Tennessee statute. The pertinent statutory provision he used reads: "[T]he superintendent may dismiss any employee under the superintendent's jurisdiction for incompetence, inefficiency, insubordination, improper conduct or neglect if duty; provided, that no one shall be dismissed without first having been given, in writing, due notice of the charge or charges and an opportunity for defense." Tenn. Code Ann. § 49-2-301(f)(33).

we must "evaluate the challenged procedures directly to ensure that they comport with due process." *Macene*, 951 F.2d at 706.

The traditional standard for the constitutionality of a particular procedure focuses on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

Moore undisputedly received written notice of the hearing and was given an opportunity to be heard. The pertinent question that remains is whether Simmons's behavior at the hearing deprived Moore of due process. Moore takes issue with the fact that Simmons acted as an investigator, the charging party, the presiding officer at her hearing, and the party responsible for rendering the opinion concerning Moore's termination as a teacher. Moore contends that the totality of the circumstances surrounding her discharge, including Simmons's dual roles as presiding officer and investigator, his unwillingness to be cross-examined, and the finality of the decision, violated her due process rights. Defendants cite *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988)(en banc), where we found no due process violation by allowing a city manager to initiate charges, preside over the employee's pre-termination hearing, testify in the hearing, and render a decision regarding the employee's discharge.

We agree with the Defendants that the process offered Moore was constitutionally sufficient She received written notice of the charges against her, as well as an explanation of the Board's

evidence, and was offered an opportunity to present her side of the story. This meets the requirements of *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 546 (1985), *and Duchense,* 849 F.2d at 1007. Simmons's dual roles at the hearing are not fatal to the process. *See Duchesne,* 849 F.2d at 1006 ("The right to respond before the official responsible for the discharge is sufficient.").

C

Moore was apparently granted tenure by the Johnson City Board on April 5, 1993. There is a dispute as to whether the Board acted intentionally or inadvertently in conferring this status upon Moore. If indeed she is a tenured teacher, then she would have increased statutory due process protection before she could be terminated. Tenn. Code Ann. §§ 49-5-511 and 512. The district court found that the Board accidentally conferred tenure upon Moore, and that, in any event, she had not met the requirements of the Tennessee Teacher Tenure Act. Tenn. Code Ann. §§49-5-503(2), 49-5-504(a). We review this mixed question of law and fact de novo. *Waxman v. Luna,* 881 F.2d 237, 239 (6th Cir. 1989).

The pertinent portion of § 49-5-503(2)(C) reads, "(2) 'Permanent tenure' applies to any teacher who . . . (C) Has completed a probationary period of three (3) school years or not less than twenty-seven (27) months within the last five-year period, the last year to be employed as a regular teacher[.]" Apparently, Moore contends that she had completed the twenty-seven month probationary period by including the following in her calculus: three years as a teacher's aide; one year as a teacher intern; from March 18, 1992, until the end of the 1991-92 school year as a regular teacher; and the entire 1992-93 school year as a regular teacher. Defendants concede that Moore's time as a regular classroom teacher which includes the partial 1991-92 school year and the entire 1992-93 school year (totaling approximately

eleven months) should be considered. They also will assume *arguendo* that employment as an intern (ten months) should count toward tenure. However, the two parties disagree as to whether Moore's employment as a teacher's aide should be considered. Clearly, if this period counts toward tenure, then Moore has indeed completed the required probationary period.

The question for us is whether time as a teacher's aide should be included toward Moore's probationary period. The case law does not address the issue directly, but the language of Tennessee Code Annotated § 49-5-504(a) is helpful. It reads:

> (a) Any teacher, otherwise qualified for 'permanent tenure' status or 'limited tenure' status shall serve three (3) years or not less than twenty-seven (27) months within a five-year period as a probationary teacher before acquiring 'permanent tenure' status or 'limited tenure' status.

The phrase, "probationary teacher," seems to refer only to those individuals that can be classified as teachers. Taking Moore's position, almost any job within the school system, including clerical or janitorial staff, would apply toward tenure as long as that individual was employed as a "regular teacher" for the year immediately preceding tenure. This does not seem to be the intention of the Tennessee legislature. Accordingly, Moore did not qualify for tenure under the statute.

AFFIRMED.

APPENDIX D

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more em ployees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe;

or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For

the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub.L. 101-336, Title I, § 101, July 26, 1990, 104 Stat. 330; Pub.L. 102-166, Title I, § 109(a), Nov. 21, 1991, 105 Stat. 1077.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. House Report No. 101-485 (Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

1991 Acts. House Report No. 102-40 (Parts I and II), Interpretive Memorandum, and Statement by President, see 1991 U.S. Code Cong. and Adm. News, p. 549.

References in Text

The effective date of this subchapter, referred to in par. (5)(A), is 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as an Effective Dates of 1990 Acts note under this section.

The Controlled Substances Act, referred to in par. (6), is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (section 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classficiation of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

Amendments

1991 Amendments. Par. (4). Pub.L. 102-166 added provisions relating to employment in a foreign country.

Effective Dates

1991 Acts. Amendement by Pub.L. 102-166 not to apply to conduct occurring before November 21, 1991, see section 109(c) of Pub.L. 102-166, set out as a note under section 2000e of this title.

1990 Acts. Section 108 of Pub.L. 101-336 provided that: "This title [subchapter] shall become effective 24 months after the date of enactment [July 26, 1990]."

CROSS REFERENCES

Individualized support services to national service individual with disability as defined in this section, see 42 USCA § 12594.

"Qualified individual with a disability" as having same meaning as under this section for purposes of nondiscrimination in—

Domestic volunteer services, see 42 USCA § 5057.

National and community service state grant programs, see 42 USCA § 12635.

Reasonable accommodation as defined in this section for purposes of national service grants to assist entities in placing disabled applicants, see 42 USCA § 12581.

LIBRARY REFERENCES

Administrative Law

Procedural regulations, Equal Employement Opportunity Commission, see 29 C.F.R. § 1601.1 et seq.

American Digest System

Employment discrimination against individuals with handicaps or disabilities prohibited, see Civil Rights [key] 173 et seq.

Encyclopedias

Employment discrimination against individuals with handicaps or disabilities prohibited, see C.J.S. Civil Rights § 201 et seq.

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AIDS in the food industry. Rebecca Winterscheidt, 28 Ariz. Atty. 13 (Mar. 1992).

AIDS-phobia claims and the Disabilities Act. Leo T. Crowley, 212 N.Y.L.J. 3 (Oct. 20, 1994).

Americans with Disabilities Act: An overview of the employment provisions. Thomas S. Christopher and Charles M. Rice, 33 S.Tex.L.Rev. 759 (1992).

Americans with Disabilities Act as it relates to AIDS in the workplace. Vimal K. Shah, 6 CBA Rec. 33 (Nov. 1992).

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Balancing interests under the ADA. Richard Corenthal, 210 N.Y.L.J. 1 (July 2, 1993).

Beyond reasonable accommodation: Availability and structure of a cause of action for workplace harassment under the Americans with Disabilities Act. Frank S. Ravithc, 15 Cardozo L.Rev. 1475 (1994).

Breaking down the telephone barrier—Relay services on the line. Karen Peltz Strauss and Robert E. Richardson, 64 Temp.L.Rev. 583 (1991).

Civil Rights Act of 1991 and EEOC enforcement. Donald R. Livingston, 23 Stetson L.Rev. 53 (1993).

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ERISA preemption and its efforts on capping the health benefits of individuals with AIDS: a demonstration of why the United States health and insurace systems require substantial reform. Comment, 30 Hous.L.Rev. 1347 (1993).

Labor relations: Liability of supervisors. John P. Furfaro and Maury B. Josephson, 210 N.Y.L.J. 3 (Sept. 3, 1993).

Nonconsensual HIV testing in the health care setting: The case for extending the occupational protections of California proposition 96 to health care workers. Note, 26 Loy.L.A.L.Rev. 1251 (1993).

Privatizing justice: A jurisprudential perspective on labor and employement arbitration from the *Steelworkers Trilogy to Gilmer*. Martin H. Malin and Robert F. Ladenson, 44 Hastings L.J. 1187 (1993).

Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab.L. 201 (1993).

Sexual exclusions: Americans with Disabilities Act as a moral code. 94 Colum.L.Rev. 1451 (1994).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

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1. Construction with other laws

To a great extent, employment provision of ADA merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that regulations issued by Equal Employment Opportunity Commission (EEOC) in implementation of Rehabilitation Act imposed on federal agencies and federal contractors and therefore, federal court can look to decisions interpreting those regualtions for clues to meaning of the same terms in ADA. Vande Zande v. State of Wis. Dept. of Admin., C.A.7 (Wis.) 1995, 44 F.3d 538.

2. Retroactive effect

State employee's disability discrimination claim accrued when his position was abolished, prior to effective date of ADA, and thus employee failed to state claim under ADA, due to nonretroactivity of that statute. Powell v. State of N.Y., N.D.N.Y. 1994, 869 F.Supp. 106.

ADA does not apply retroactively to private employers. Gonzales v. Garner Food Services, Inc., N.D.Ga. 1994, 855 F. Supp. 371.

3. Covered entity

Employee of state natural resources department could bring ADA action against department officials, in their offical capacities, for department's refusal to grant employee's transfer requests, because, as agents of department, officials were "covered entities" under ADA. Bodiford v. State of Ala., M.D.Ala 1994, 854 F.Supp. 886.

4. Direct threat

The Americans With Disabilities Act does not require employment of disabled indi-

vidual, if that individual poses "direct threat to health and safety of others," defined as significant risk to health or safety of others that cannot be eliminated by modificatin of policies, practices or procedures or provision of auxiliary aids or serves. Bombrys v. City of Toledo, N.D.Ohio 1993, 849 F.Supp. 1210.

Employer's executive director's inability to drive did not pose significant risk of substantial harm to health and safety of director or others that could not be eliminated or reduced by reasonable accommodation, as required to support employer's "direct threat" defense in director's action under Americans with Disabilities Act (ADA); driving was not essential function of executive director's position, and providing director with alternative mode of transportation was reasonable accommodations. U.S. E.E.O.C. v. AIC Sec. Investigation, Ltd., N.D.Ill.1993, 820 F. Supp. 1060.

5. Employee

Title 1 of ADA did not apply to former employer's conduct in implementing cap on health care coverage for Acquired Immunodeficiency Syndrome (AIDS) after it had already fired the employee whose benefits it sought to curtail; fired employee was not "employee," for purposes of the ADA. Gonzales v. Garner Food Services, Inc., N.D.Ga.1994, 855 F.Supp. 371.

Former police officers who were receiving disability pensions stated disability discrimination claim against city under Americans with Disabilities Act of 1990 (ADA), based on city's requirement that they pay for their own health insurance; at initial pleading stage it was too early to conclude that retirees were not "covered employees" under ADA. Northen v. City of Chicago, N.D.Ill.1993, 841 F.Supp.234.

6. Employer—Generally

Coverage as employer subject to Title I of ADA is not automatic wherever employer of requisite number of persons

takes some action that affects employee of another entity; a great deal may depend on cirucmstances. Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., C.A.1 (N.H.) 1994, 37 F.3d 12.

7. ——Number of employees

Law firm and five nominally separate corporate entites would be consolidated for purpose of meeting 25-employee jurisdictional floor in attorney's Americans with Disabilites Act (ADA) action alleging that he was discharged from law firm because he was diangosed with acquired immunodeficency syndrome (AIDS); firm and each corporation contributed something to common enterprise, between 90% and 99% of cases handled by firm were on behalf of one of corporations, employees of that corporation routinely performed work in name of firm and its attorneys, firm and corporations shared office suite, fax lines, printing services, and toll-free telephone number, management and control of firm and corporations was centralized in hand of two officers, and one of those officers, directly or indirectly, owned 100% of stock of each corporation. Doe v. William Shapiro, Esquire, P.C., E.D.Pa.1994, 852 F.Supp. 1246.

8. —— Agents

Trade association and its administering trust for health benefit plan were "employers": of association member's employee within meaning of Title I of ADA, if association and trust exercised control over important aspect of employment with respect to employee health care coverage, i.e., had authority to determine level of benefits, if association and trust existed solely for purpose of enabling entities such as member to delegate responsibility to provide health insurance, or if association and trust were agents of covered entity acting on behalf of entity in matter of providing and administering employee health benefits. Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., C.A.1 (N.H.) 1994, 37 F.3d 12.

Administrator of employee benefits for statutory employer under ADA was not agent of that employer, for purposes of determining whether it could be held liable for benefits that allededly discrimiated based on disability; Title VII interpretation of "employer" was applicable to ADA, and administrator of Title VII employer's benefits would not be deemed agent of employer solely because it administrered employee benefits for that employers. Pappas v. Bethesda Hosp. Ass'n, S.D.Ohio 1994, 861 F.Supp. 616.

Company president, who acted as agent for company, was an "employer" for purposes of ADA. Braverman v. Penobscot Shoe Co., D.Me. 1994, 859 F.Supp. 596.

9. ——Private membership clubs

Not-for-profit corporation was "club" in ordinary sense of the word, for purposes of determining whether it was private membership club exempt from employment discrimination under Americans with Disabilities Act (ADA); members jointly supported corporation, met periodically, conferred membership by secret ballot, and had privilege of use of corporation's facilities. Kelsey v. University Club of Orlando, Inc., M.D.Fla. 1994, 845 F.Supp. 1526.

10. —— Shared responsibilities

Whether member of trade association shared in administrative responsibilities resulting from member employee's participation in health benefit plan offered by association and its administering trust was relevant to determination whether association and trust were so intertwined with member that they had to be deemed employers for purposes of Title I of ADA; sharing of responsibilities would tend to suggest that member, association, and trust were so intertwined as to be acting as employer with respect to health care benefits. Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, In.c, C.A.1 (N.H.) 1994, 37 F.3d 12.

11. ——Corporations

Health plan was separate and distinct entity from medical group that employed physician, and was not itself physician's employer for purpose of ADA, despite fact that, by virtue of contractual arrangement, the entities shared common trade name as well as legal resources and counsel, where entities had distinct corporate offices, had different corporate boards and officers, and did not commingle or share responsibilities or decision-making authority, and physician's actions indicated her awareness of distinction between health plan and medical group. Reigel v. Kaiser Foundation Health Plan of North Carolina, E.D.N.C.1994, 859 F.Supp. 963.

Owner of professional corporation was alter ego of corporation and thus was "employer" for purposes of liability under ADA and Title VII, where corporation consisted of owner and a number of associates and there was no one else with authority and responsibility equal to owner's. Janopoulos v. Harvey L. Walner & Associates, Ltd., N.D.Ill.1993, 835 F.Supp. 459.

12. ——Insurance providers

Americans with Disabilities Act did not apply to federal employees' claims against health insurance provider under Federal Employees Health Benefit (FEHB) plan concerning coverage of bone marrow transplants for only certain types of cancer, in light of fact that insurance provider was not "employer" of federal employees within meaning of Act. Dodd v. Blue Cross and Blue Shield Ass'n, E.D.Va.1993, 835 F.Supp. 888.

13. ——Police

City police officers could not state claim under Americans with Disabilities Act against individual members of city police department in their personal capacities; individual defendants were not "employers," within meaning of Act. Thompson v. City of Arlington, Tex., N.D.Tex.1993, 838 F.Supp. 1137.

14. ——Supervisors

Supervisory officer is not "employer" subject to personal liability within meaning of ADA, Title VII, or Rehabilitation Act; Congress' limitation of Title VII definition of "employer" to person with 15 or more employees suggests intent to protect those with limited resources from liability, purpose of incorporation by Title VII and ADA of "any agent" into definition of "employer" is to underscore notion of employer's derivative liability, and remedial purposes of the three acts were not undermined by precluding supervisory employee from having personal liability, since such employees would be deterred from making discriminatory decisions by threat of termination, suspension, or demotion. Haltek v. Village of Park Forest, N.D.Ill.1994, 864 F.Supp. 802.

Generally, individual with supervisory authority is considered "agent" of employer for purposes of ADA. Bishop v. Okidata, Inc., K.N.J.1994, 864 F.Supp. 416.

Supervisory employees may be individually liable for discrimination under ADA if they were decision-making employees or were actually employers themselves. DeLuca v. Winer Industries, Inc., N.D.Ill.1994, 857 F.Supp. 606.

Supervisor could not be held individually liable for acts of sex and handicap discrimination against employee under Americans with Disabilities Act (ADA) and Title VII. Vodde v. Indiana Michigan Power Co., N.D.Ind.1994, 852 F.Supp. 676.

15. Illegal use of drugs

Former employee who misrepresented nature of his medical problems in effort to get his attending physicians to prescribe medications for him engaged in illegal use of drugs, for purposes of Americans with Disabilities Act (ADA) provision excluding such persons from coverage. McDaniel v. Mississippi Baptist Medical Center, S.D.Miss.1994, 869 F.Supp. 445.

16. Person

Regulation promulgated pursuant to ADA, concerning examinations offered by private entities, applied to New York State Board of Law Examiners; although regulation referred to "private entity," Act defined "person" to include governments and government agencies. Pazer v. New York State Bd. of Law Examiners, S.D.N.Y.1994, 849 F.Supp. 284.

17. Qualified individual with a disability

See, also, Notes of Decisions under section 12112 of this title.

Business college instructor, who suffered from lupus erythematosus, an autoimmune system disorder; was not "qualified" for her position within meaning of ADA, even though she received "excellent" and "good" performance evaluations; position required that instructor teach assigned courses during scheduled class times and spend time with her students, instructor missed more than 40 days of work in seven months, missed crucial beginning of instructional cycle twice, and informed college that she would miss beginning of cycle third time, and college's extensive accommodations of instructor's condition did not improve her attendance level. Tyndall v. National Educ. Centers, Inc. of California, C.A.4 (Va.) 1994, 31 F.3d 209.

"Qualified individual" for ADA purposes is someone who can perform essential functions of his job with or without reasonable accommodation. Stradley v. Lafourche Communications, Inc., E.D.La. 1994, 869 F.Supp. 442.

Preschool teacher who allegedly suffered from epilepsy established that she was "qualified individual" with disability within meaning of ADA; teacher was employed for period of over five years, and there was no indication that, with accommodations for her absences due to her epilepsy, teacher was unable to perform any function required for her position. Susie v. Apple Tree Preschool and Child Care

Center, Inc., N.D.Iowa 1994, 866 F.Supp. 390.

Customer service representative who was unable to perform essential function of handling telephone calls from customers due to panic attacks, mood swings, and disassociative episodes was not a "qualified individual" under Americans with Disabilities Act (ADA) and, thus, employer was not required to accommodate employee's disability. Larkins v. CIBA Vision Corp., N.D.Ga.1994, 858 F.Supp. 1572.

18. Reasonable accommodation

See, also, Notes of Decisions under section 12112 of this title.

Under ADEA, accommodation that allows disabled worker to work at home, at full pay, subject only to slight loss of sick leave that may never be needed, hence never missed, is reasonable as a matter of law. Vande Zande v. State of Wis. Dept. of Admin., C.A.7 (Wis.) 1995, 44 F.3d 538.

Reasonable accommodation required by ADA does not require that employer create a light-duty position or new permanent position for disabled employee; however, if employer has a vacant light-duty position or vacant permanent position for which disabled employee is qualified, it would be a reasonable accommodation to reassign employee to that position, and if position was created as a temporary job, reassignment to that position need only be for temporary period at the job. Howell v. Michelin Tire Corp., M.D. Ala.1994, 860 F.Supp. 1488.

Although ADA requires employer to make reasonable accommodations for individuals who are qualified to perform essential requiremnts of their employment, it cannot be construed to require employer to make fundamental or substantial modifications in its operations to assure every disabled individual the benefit of employment. Reigel v. Kaiser Foundation Health Plan of North Carolina, E.D.N.C.1994, 859 F.Supp. 963.

"Reasonable accommodation" of disabled employee, under Americans with Disabilities Act (ADA), does not require employer to eliminate essential functions of position to accommodate employee. Larkins v. CIBA Vision Corp., N.D.Ga. 1994, 858 F.Supp. 1572.

Under Rehabilitation Act of 1973 and Americans with Disabilities Act (ADA), it is not necesary for employer to create new, unnecessary position to accommodate handicapped employee, but, if new disability prevents employee from performing present job, effort to place him in existing position which is vacant, for which he is qualified, and which he can perform must be made. Wooten v. City of Columbus, Div. of Water, 1993, 632 N.E.2d 605, 91 Ohio App.3d 326.

19. Undue hardship

Under ADA, financial condition of employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship. Vande Zarde v. State of Wis. Dept. of Admin., C.A.7(Wis) 1995, 44 F.3d 538.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or

status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimiation of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a realationship or associaiton;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an indi-

vidual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitutde, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to any employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foregin person not controlled by an American employer.

(C) Determination

For purposes of the paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;
(ii) the common managment;
(iii) the centralized control of labor relations; and
(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perfrom job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

(Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331; Pub.L. 102-166, Title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

1991 Acts. House Report No. 102-40(Parts I and II), Interpretive Memorandum, and Statement by President, see 1991 U.S. Code Cong. and Adm. News, p. 549.

Amendments

1991 Amendments. Subsec. (c). Pub.L. 102-166, § 109(b)(2), added sub sec. (c) and redesignated former subsec. (c) as (d).

Subsec. (d). Pub.L. 102-166, § 109(b)(2), redesignated former subsec. (c) as (d).

Effective Dates.

1992 Acts. Amendment by Pub.L. 102-166 not to apply to conduct occurring before November 21, 1991, see section 109(c) of Pub.L. 102-166, set out as a note under section 2000e of this title.

1990 Acts. Section effective 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as a note under section 12111 of this title.

CROSS REFERENCES

Architect of the Capitol Human Resources Program discriminatory practices prohibited, see 40 USCA § 166b-7.

Damages in cases of intentional discrimination in employment, see 42 USCA § 1981a.

LIBRARY REFERENCES

Administrative Law

Deaf individuals, training interpreters, see 34 C.F.R. § 396.1 et seq.

Nondiscrimination in employment on basis of disability, see 29 C.F.R. § 1630.1 et seq.

American Digest System

Employment discrimination against individuals with handicaps or disabilities prohibited, see Civil Rights [key] 173 et seq.

Encyclopedias

Employment discrimination against individuals with handicaps or disabilities prohibited, see C.J.S. Civil Rights § 201 et seq.

Law Reviews

AIDS in the food industry. Rebecca Winterscheidt, 28 Ariz.Atty. 13 (Mar. 1992).

AIDS-phobia claims and the Disabilities Act. Leo T. Crowley, 212 N.Y.L.J. 3 (Oct. 20, 1994).

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Americans with Disabilities Act of 1990: Social integration through employment. Note, 40 Cat.U.L.Rev. 189 (1990).

An employer's guide to the Americans with Disabilities Act: From job qualifications to reasonable accommodations. Lawrence P. Postol and David D. Kadue, 24 J. Marshall L.Rev. 693 (1991).

Beyond reasonable accommodation: Availability and structure of a cause of action for workplace harassment under the Americans with Disabilities Act. Frank S. Ravitch, 15 Cardozo L.Rev. 1475 (1994).

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Drug and alcohol policies: ADA concerns. Amy Karff Halevy, 55 Tex.B.J. 836 (1992).

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New era of employment litigation: Overview of Americans with Disabilities Act. Kim F. Ebert & Joseph M. Perkins, Jr., 34 Res Gestae 318 (1991).

Post Office Square or Pemberton Square? Which way to turn with an employment discrimination suit. Joan A. Lukey and Gabrielle R. Wolohojian, 36 Boston B.J. 8 (Jan.-Feb. 1992).

Resonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab.L. 201 (1993).

Retroactivity of the Civil Rights Act of 1991. David Allen, 44 Baylor L.Rev. 569 (1992).

Sexual exclusions: Americans with Disabilities Act as a moral code. 94 Colum.L.Rev. 1451 (1994).

Workers' comp. and the ADA. Katrina Grider, 55 Tex.B.J. 818 (1992).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

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1. Prima facie case—Generally

To state prima facie case under ADA, plaintiff must prove that he suffers from disability, that he is a qualified individual, and that he suffered adverse employment action because of his disability. Stradley v. Lafourche Communications, Inc., E.D.La.1994, 869 F.Supp. 442.

To establish prima facie case of discrimination in violation of Americans with Disabilities Act (ADA), plaintiff must prove (1) that he is qualified individual with disability; (2) that he has suffered adverse employment action; and (3) that causal connection exists between adverse employment action and the disability. Smith v. Upson County, Ga., M.D.Ga.1994, 859 F.Supp. 1504.

2. ——Discharge

To establish prima facie case of discriminatory discharge in violation of ADA, plaintiff must establish that he is a qualified individual with a disability, and he is suffering discrimination because of that disability. Sawinski v. Bill Currie Ford, Inc., M.D.Fla. 1994, 866 F.Supp. 1383.

To state a prima facie case of discriminatory discharge in violations of ADA, plaintiff must allege that she suffers from a disability; is otherwise qualified to perform essential functions of employment, with or without reasonable accommodation; and suffers discrimination because of disability. Patterson v. Downtown Medical and Diagnostic Center, Inc., M.D.Fla.1994, 866 F.Supp. 1379.

3. ——Hiring

Plaintiff may establish prima facie case under ADA by showing that he suffers from disability, there was position available for which he was qualified, and position was given to person who was not disabled. West v. Russell Corp., M.D.Ala. 1994, 868 F.Supp. 313.

4. ——Pretext

To establish prima facie case of discriminatory discharge on pretext theory under ADA plaintiff must show that he is within protected class, that he was qualified for job, and that he was terminated; if plaintiff meets this burden, then burden shifts to defendants to articulate legitimate, nondiscriminatory reason for adverse employment decision, which can be rebutted by showing that employer's evidence is unworthy of credence. Doe v. Kohn Nast & Graf, P.C., E.D.Pa. 1994, 862 F.Supp. 1310.

5. Qualified individual—Generally

For Notes of Decisions relating to the definitation of "Qualified individual with a disability", see section 12111 of this title.

Numerous submissions and certifications by physician, made to several different entities in support of claims for disability benefits, precluded

physician from demonstrating that she was qualified to perfrom functions for job with employer during same period she was collecting disability payments, a necessary element to claim under ADA. Reigel v. Kaiser Foundation Health Plan of North Carolina, E.D.N.C. 1994, 859 F.Supp. 963.

To prevail on claim under Rehabilitation Act of 1973 or ADA, plaintiff must prove that he is "qualified individual" with a disability. Dutton v. Johnson County Bd. of County Com'rs, D.Kan. 1994, 859 F.Supp. 498.

6. ——Discharge

Former truck salesman stated cause of action against former employer for violation of ADA in connection with his discharge by alleging that he suffered from cranial disfigurement and deafness as a result of brain surgery so that he was an individual with a disability, that he returned to employment after surgery and worked there for approximately six years before his termination indicating that he could perfrom essential functions of his position, and that former employer took adverse employment action against salesman because of his disability based on impact of disability on former employer's cost of salesman's health insurance. Sawinski v. Bill Currie Ford, Inc., M.D.Fla.1994, 866 F.Supp. 1383.

Police officer whose restricted use of his right arm and hand prevented him from using two-handed "Weaver stance" and from completing state-mandated handgun training program was not "qualified individual with a disability" and, thus, termination of his provisional employment did not violate ADA. Ethridge v. State of Al., M.D.Ala.1994, 860 F.Supp. 808.

Food server who was fired from restaurant when she suffered "melt down" because she was unable to handle pressure of work on particularly busy evening was not "qualified invidual" thus precluding her recovery under ADA; her disability, caused by, inter alia, panic attack disorder, prevented her from performing essential functions required of food

server at restaurant, with or without reasonable accommodation, as restaurant had right to determine whether changes in matter such as food ingredients, portion sizes, and pricing were necessary in order to stay competitive, and server testified that changes of that kind caused "a panic attack all the time." Johnston v. Morrison, Inc., N.D.Ala.1994, 849 F.Supp. 777.

Fact issue as to whether employer's executive director, who suffered from cancer, was "qualified" to perform his job within meaning of Americans with Disabilities Act (ADA) precluded summary judgment in director's ADA action against employer based on his discharge; although director was required to miss work because of surgery and cancer treatment, evidence indicated that he was able to work long hours and that profits of director's division increased while employer's overall profits decreased. U.S. E.E.O.C. v. AIC Sec. Investigation, Ltd., N.D.Ill.1993, 820 F.Supp. 1060.

7. ——Harassment

Plaintiff who was not a "qualified individual" within meaning of ADA could not make out claim for discriminatory harassment in violation of ADA. Mannell v. American Tobacco Co., E.D.Va.1994, 871 F.Supp. 854.

8. ——Hiring

Refusing to hire police officer due to his lack of candor regarding his past drug use did not violate Americans With Disabilities Act (ADA), even if officer's past level of drug use constituted disability within meaning of ADA, since he was not "otherwise qualified" for his position; if officer's drug use was so severe that it constituted major life impairment, then his previous statements to police department during application process indicating he used only small amount of drugs were inaccurate by several magnitudes. Hartman v. City of Petaluma, N.D.Cal. 1994, 841 F.Supp. 946.

9. ——Transfer

Employee who was transferred from delivery driver position because he was an

insulin-dependent diabetic established that he was a "qualified individual with a disability" under the ADA; employer admitted that employee's diabetes was currently under control, and that employee had not experienced a hypoglycemic episode since having been diagnosed with diabetes three years previously; based on medical testimony, employee was entitled to be returned to previously held driver position to drive motor vehicles weighing 10,000 pounds or less with reasonable accommodation that food be within reach and that he carry neither passengers or hazardous materials. Sarsycki v. United Parcel Service, W.D.Okla.1994, 862 F.Supp. 336.

10. Relationship or association with disabled person

Termination of business college instructor's employment was not discrimination, in violation of ADA, based on her association with her disabled son; supervisor responded to instructor's record of extended absences in connection with son's care and to instructor's actual statement that she would, in fact, have to miss additional work in order to be with son, rather than making unfounded assumption that instructor would have to miss work to take care of son, and ADA did not require college to restructure instructor's work schedule to enable her to care for disabled son. Tyndall v. National Educ. Centers, Inc. of California, C.A.4 (Va.) 1994, 31 F.3d 209.

Americans with Disabilities Act (ADA) section prohibiting employer from excluding or otherwise denying equal jobs or benefits to qualified person because of known disability of person with whom qualified person is known to have a relationship or association did not preclude termination of employee who allegedly was fired, in part, because he kept secret the knowledge that company account executive had prostate cancer; such a firing was not because of employee's association with account executive but because of his omission in reporting to his supervisor. Braverman v. Penobscot Shoe

Co., D.Me.1994, 859 F.Supp. 596.

11. Reasonable accommodation

For Notes of Decisions relating to the definition of "Reasonable accommodation", see section 12111 of this title.

Intermittent, episodic impairments, such as broken leg, are not disabilities under ADA, but an intermittent impairment that is a characteristic manifestation of admitted disability is part of the underlying disability and, hence, condition that employer must reasonably accommodate. Vande Zande v. State of Wis. Dept. of Admin., C.A.7 (Wis.) 1995, 44 F.3d 538.

Former employee violated a company policy specifically authorized by ADA, one prohibiting working under the influence of alcohol or other drugs, and thus could not belatedly avail himself of reasonable accommodation provision of ADA after his termination. Flynn v. Raytheon Co., D.Mass.1994, 868 F.Supp. 383.

Genuine issues of material fact existed as to whether employer *reasonably* accommodated an employee who was disabled due to a congenital deformation of hip area and, if not, whether employer could have reasonably accommodated the employee without an undue burden, precluding summary judgment in action brought under ADA. Howell v. Michelin Tire Corp., M.D.Ala. 1994, 860 F.Supp. 1488.

Police officer who had been provisional city employee was "applicant" within meaning of ADA and, thus, city owed duty of reasonable accommodation during police academy training; ADA protected officer during his training from adverse treatment that limited employment opportunities. Ethridge v. State of Ala., M.D.Ala.1994, 860 F.Supp. 808.

Once applicant for state bar exam has established that he or she has specific impairment that substantially limits his or her learning ability, State Board of Law Examiners is required to make reasonable accommodations to ensure that applicant is not disadvantaged in taking

exam. Argen v. New York State Bd. of Law Examiners, W.D.N.Y.1994, 860 F.Supp. 84.

Medical group's duty to accommodate disabled physician under the ADA could not require it to restrict physician's duties to supervision and administration or to permanently assign existing physician assistant to work with physician to perfrom physical aspects of physician's work or hire a new assistant to do the same; law did not require that medical group undergo involuntary restructuring or that it hire two persons to do tasks ordinarily assigned to one. Reigel v. Kaiser Foundation Health Plan of North Carolina, E.D.N.C.1994, 859 F.Supp. 963.

Employer who fails to provide reasonable accommodation to known physical or mental limitations of qualified individual with disability commits unlawful discrimination unless accommodation can be shown to impose undue hardship. Dutton v. Johnson County Bd. of County Com'rs, D.Kan. 1994, 859 F.Supp. 498.

State officials reasonably accommodated paraplegic employee's request to be allowed to work at home full time while her pressure ulcers related to her disability healed; during eight weeks employee was at home, officials provided her with all but 16.5 hours of time for which she requested work, employee took paid sick leave for hours she did not work, and did not lose any benefits, seniority rights or privileges of employment during her convalescence. Vande Zande v. State of Wis. Dept. of Admin., W.D.Wis.1994, 851 F.Supp. 353, affirmed 44 F.3d 538.

State employer failed to reasonably accommodate handicapped employee by allowing employee to use annual leave for sick time, even though employee had previously exhausted medical leave allowed under collective bargaining agreement, given that request for accommodation would not have required employer to reassign tasks or otherwise affect rights of other workers. Eisfelder v. Michigan Dept. of

Natural Resources, W.D.Mich. 1993, 847 F.Supp. 78.

Employee having pulmonary disability was not entitled under Americans with Disabilities Act (ADA) to complete smoke-free work environment as reasonable accommodation to his disability; employee could perform essential functions of his position with accommodations made by employer, such as providing fans, smokeless ashtrays, air purifiers, moving employees to increase space between smokers and nonsmokers, prohibiting smoking in restrooms, conference rooms and hallways and limiting smoking to smoker's cubicle, as evidenced by employee's job performance appraisals which indicated that he consistently met his job requirements. Harmer v. Virginia Elec. and Power Co., E.D.Va. 1993, 831 F.Supp. 1300.

Insurance company was not required under the ADA to accommodate insurance agent who could not carry his computer along on sales calls because of a back injury by providing him with an agent-in-training to carry his computer on sales calls, as agent could easily have made his own accommodation by purchasing a lighter computer, or by procuring a rolling "luggage rack" to move the computer. Lillback v. Metro. Life Ins. Co., Ohio App. 2 Dist. 1994, 640 N.E.2d 250, 94 Ohio App.3d 100.

12. Inquiries as to disability

Attorney infected with Human Immunodeficiency Virus (HIV) stated cause of action against law firm for which he worked for violation of ADA section prohibiting employer's inquiries of employee as to whether individual has a disability or as to nature or severity of disability by alleging that he had told one attorney in firm that he was ill, that attorney became suspicious about nature of illness, searched plaintiff attorney's office, and discovered letter from university Acquired Immunodeficiency Syndrome (AIDS) services and placed it in his personal file. Doe v. Kohn Nast & Graf, P.C., E.D.Pa. 1994, 866 F.Supp. 190.

13. Rehiring

Failure to rehire disabled worker for plant manager position given to other worker did not violate ADA or Kansas Act Against Discrimination (KAAD), where other worker's promotion did not evidence available plant manager position for which worker could have been recalled. Malek v. Martin Marietta Corp., D.Kan. 1994, 859 F.Supp. 458.

14. Retirement benefits

City's policy of paying only part of accrued sick time to firefighters who retired on disabled basis, but paying all accrued time for nondisability retirement did not violate Americans with Disabilities Act as applied to firefighter who retired on disabled basis; firefighter could have retired on regular service basis, but chose to retire on disabled basis for own purposes and, thus, firefighter was not excluded from any program and in reality sought special treatment rather than merely nondiscriminatory treatment. Felde v. City of San Jose, N.D.Cal.1994, 839 F.Supp. 708.

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from

giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

(Pub.L. 101-336, Title I, § 103, July 26, 1990, 104 Stat. 333.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

Effective Dates

1990 Acts. Section effective 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as a note under section 12111 of this title.

CROSS REFERENCES

Architect of the Capitol Human Resources Program discriminatory practices prohibited, see 40 USCA § 166b-7.

LIBRARY REFERENCES

American Digest System

Action for employment discrimination against handicapped person; defenses, see Civil Rights [key] 210.

Encyclopedias

Action for employment discrimination against handicapped person; defenses, see C.J.S. Civil Rights § 235.

Law Reviews

AIDS in the food industry. Rebecca Winterscheidt, 28 Ariz.Atty. 13 (Mar. 1992).

AIDS-phobia claims and the Disabilities Act. Leo T. Crowley, 212 N.Y.L.J. 3 (Oct. 20, 1994).

Americans with Disabilities Act as it relates to AIDS in the workplace. Vimal K. Shah, 6 CBA Rec. 33 (Nov. 1992).

An employer's guide to the Americans with Disabilities Act: From job qualifications to reasonable accommodations. Lawrence P. Postol and David D. Kadue, 24 J. Marshall L.Rev. 693 (1991).

Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab.L. 201 (1993).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Direct threat to health or safety 1
Qualifications 3
Sobriety policy 2

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1. Direct threat to health or safety

Under ADA and Oregon Law, termination of truck driver who suffered from alcoholism was not justified by threat to public safety, where employer's medical review officer (MRO) believed that driver would be able to safely drive truck once he completed rehabilitation program. Schmidt v. Safeway Inc., D.Or.1994, 864 F.Supp. 991.

2. Sobriety policy

In action under Americans With Disabilities Act (ADA), arising from termination by chemical dependency center

of employee who suffered relapse of chemical dependency problems, material issues of fact existed as to whether center's sobriety policy provided it with affirmative defense, precluding summary judgment. McDaniel v. Mississippi Baptist Medical Center, S.D.Miss.1994, 869 F.Supp. 445.

3. Qualifications

Employer's affirmative defense that former employee did not show he was qualified for position for which he was fired was proper defense to employee's claim under ADA, and would not be stricken. Flasza v. TNT Holland Motor Exp., Inc., N.D.Ill.1994, 155 F.R.D. 612.

§12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that

an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in

sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph

(1) from safety-sensitive duties in implementing subsection (c) of this section.

(Pub.L. 101-336, Title I, § 104, July 26, 1990, 104 Stat. 334.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

References in Text

The Drug-Free Workplace Act of 1988, referred to in subsec. (c)(3), is subtitle D (sections 5151 to 5160) of Pub.L. 100-690, Title V, Nov. 18, 1988, 102 Stat. 4304, which is classified to chapter 10 (section 701 et seq.) of Title 41 Public Contracts. For complete classification of this Act to the Code, see Short Title of 1988 Acts note set out under section 701 of Title 41 and Tables.

Effective Dates

1990 Acts. Section effective 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as a note under section 12111 of this title.

CROSS REFERENCES

Architect of the Capitol Human Resources Program discriminatory practices prohibited, see 40 USCA § 166b-7.

LIBRARY REFERENCES

American Digest System

Employment discrimination against handicapped or disabled person; alcohol or drug abuse, see Civil Rights [key] 107(3), 173 et seq., 174.

Encyclopedias

Employment discrimination against handicapped or disabled person; alcohol or drug abuse, see C.J.S. Civil Rights §§ 201 et seq., 205, 213, 215.

Law Reviews

Drug and alcohol policies: ADA concerns. Amy Karff Halevy, 55 Tex.B.J. 836 (1992).

Drug testing of employees and applicants: Legal and practical considerations for private employers in New York. Kevin G. Chapman, 66 N.Y.S.B.J. 14 (Feb. 1994).

Employment provisions of the Americans with Disabilities Act. John J. Murphy Jr., 81 Ill.B.J. 236 (1993).

Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab.L. 201 (1993).

Sexual exclusions: Americans with Disabilities Act as a moral code. 94 Colum.L.Rev. 1451 (1994).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Qualification standards or job performance and behavior 2

Rehabilitation 1

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1. Rehabilitation

Although provision of Americans With Disabilities Act (ADA) precludes employee or applicant who is currently engaged in illegal use of drugs from coverage by ADA, "safe harbor" provision restores protection which first provision takes away; thus, once substance abuser stops engaging in his illegal use and begins participating in drug rehabilitation program or actually successfully completes program or has otherwise been rehabilitated, he once again is covered by ADA. McDaniel v. Mississippi Baptist Medical Center, S.D.Miss.1994, 869 F.Supp. 445.

2. Qualification standards or job performance and behavior

Under the Americans with Disabilities Act (ADA), employer is allowed to terminate and not accommodate an alcoholic employee, if employee does not perform up to same standard as all other employees, even if the behavior is related to employee's alcoholism. Rollison v. Gwinnett County, N.D.Ga.1994, 865 F.Supp. 1564.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

(Pub.L. 101-336, Title I, § 105, July 26, 1990, 104 Stat. 336.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. House Report No. 101-485 (Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

Effective Dates

1990 Acts. Section effective 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as a note under section 12111 of this title.

LIBRARY REFERENCES

American Digest System

Employment discrimination against individuals with handicaps or disabilities prohibited, see Civil Rights [key] 173 et seq.

Encyclopedias

Employment discrimination against individuals with handicaps or disabilities prohibited, see C.J.S. Civil Rights § 201 et seq.

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

(Pub.L. 101-336, Title I, § 106, July 26, 1990, 104 Stat. 336.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. House Report No. 101-485 (parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

Effective Dates

1990 Acts. Section effective 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as a note under section 12111 of this title.

LIBRARY REFERENCES

American Digest System

Employment discrimination against individuals with handicaps or disabilities prohibited, see Civil Rights [key] 173 et seq.

Encyclopedias

Employment discrimination against individuals with handicaps or disabilities prohibited, see CJ.S. Civil Rights § 201 et seq.

Law Reviews

An employer's guide to the Americans with Disabilities Act: From job qualifications to reasonable accommodations. Lawrence P. Postol and David D. Kadue, 24 J. Marshall L.Rev. 693 (1991).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and

part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(Pub.L. 101-336, Title I, § 107, July 26, I990, 104 Stat. 336.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. House Report No. 101-485 (Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

References in Text

The Rehabilitation Act of 1973, referred to in subsec. (b), is Pub.L. 93-112, Sept. 26, 1973, 87 Stat. 355, as amended, which is classified principally to chapter 16 (section 701 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

Elective Dates

1990 Acts. Section effective 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as a note under section 12111 of this title.

CROSS REFERENCES

Damages in cases of intentional discrimination in employment, see 42 USCA § 1981a.

LIBRARY REFERENCES

Administrative Law

Recordkeeping and reporting requirements, see 29 C.F.R. § 1602.1 et seq.

American Digest System

Federal remedies for violation of anti-discrimination laws generally, see Civil Rights [key] 181 et seq.,191 et seq., 331 et seq.

Encyclopedias

Federal remedies for violation of anti-discrimination laws generally, see C.J.S. Civil Rights §§ 222 et seq., 225 et seq., 340 et seq.

Law Reviews

Beyond reasonable accommodation: Availability and structure of a cause of action for workplace harassment under the Americans with Disabilities Act. Frank S. Ravitch, 15 Cardozo L.Rev. 1475 (1994).

Civil Rights Act of 1991: Expanding remedies in employment discrimination cases. John M. Husband and Judge Biggs, 21 Colo.Law. 881 (1992).

Demise of breach of employment contracts and wrongful discharge cases. Elliott L. Epstein, 8 Me.B.J. 242 (1993).

Employment provisions of the Americans with Disabilities Act. John J. Murphy, Jr., 81 Ill.B.J. 236 (1993).

Mental disabilities in the workplace. Louis Pechman, 211 N.Y.L.J.1 (March 2, 1994).

Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab.L. 201 (1993).

Regardless of disability TCHRA provides protection. William M. Hale and Brooks William (Bill) Conover III, 55 Tex.B.J. 830 (1992).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Construction with other laws 1
Damages 2
Exhaustion of administrative remedies 3
Jurisdiction 4
Limitations 5
Right-to sue letter 6
Statute of limitations 5

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1. Construction with other laws

Employee who alleged that she was injured by conspiracy to violate section of ADA governing employment was not entitled to bring action under section of Civil Rights Act of 1871 prohibiting conspiracy for purpose of depriving persons or equal protection; to permit employee to bring such action would permit her to bypass the detailed remedial procedures that Congress provided in ADA. Pappas v. Bethesda Hosp. Ass'n. S.D.Ohio 1994, 861 F.Supp. 616.

2. Damages

Corporate employer and its sole shareholder would be held jointly and severally liable for punitive damages in action by employee discharged as result of terminal cancer, in violation of Americans with Disabilities Act; award was reduced to extent it exceeded statutory cap and aggregate punitive and compensatory damages under Civil Rights Act, and both defendants were assessed identical amounts of punitive damage by jury. U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd., N.D.Ill.1993, 823 F.Supp. 571.

3. Exhaustion of administrative remedies

Attorney infected with Human Immunodeficiency Virus (HIV) exhausted his administrative remedies with respect to ADA claims added in a second-amended complaint, even though attorney did not file charge with Equal Employment Opportunity Commission (EEOC) as to those claims, given that facts supporting claims of improper medical inquiry and intimidation and coercion by law firm for which he worked appeared in administrative charge and, therefore, one would reasonably have ex-

pected the claims to have grown out of a proper EEOC investigation. Doe v. Kohn Nast & Graf, P.C., E.D.Pa.1994, 866 F.Supp. 190.

Whether supervisory employees had actual notice of disability discrimination complaint or suffered actual prejudice was fact-based inquiry which had to be resolved in discovery, and thus disability discrimination claims against them would not be dismissed for failure to exhaust administrative remedies. Bishop v. Okidata, Inc., D.N.J.1994, 864 F.Supp. 416.

4. Jurisdiction

State courts have concurrent jurisdiction with federal courts over ADA claims; however, existence of such concurrent jurisdiction does not alter fact that ADA actions are federal question cases. Jones v. Illinois Cent. R. Co., N.D.Ill. 1994, 859 F.Supp. 1144.

5. Limitations

Plaintiff's filing of praecipe for writ of summons in Pennsylvania Court of Common Pleas constituted commencement of civil action for purposes of limitations provision governing claims under the ADA; plaintiff was not required to file a complaint conforming with Federal Rule of Civil Procedure requiring a short and plain statement of claim showing that pleader is entitled to relief. Krouse v. American Sterilizer Co., W.D.Pa.1994, 872 F.Supp. 203.

State natural resources department's alleged violation of Title VII and ADA, in refusing to grant employee's transfer requests was "continuing violation," for purpose of limitations period for filing complaint with Equal Employment Opportunity Commission (EEOC); department denied three separate transfer requests over course of year, and later requests were not merely requests to reconsider initial denial. Bodiford v. State of Ala., M.D.Ala.1994, 854 F.Supp. 886.

6. Right-to-sue letter

Procedure of filing charge of discrimination with Equal Employment Opportunity Commission (EEOC) and receiving "right to sue" letter before bring-

ing action against respondent named in charge is not jurisdictional, but party must exhaust administrative remedies before suing in federal court. Bishop v. Okidata, Inc., D.N.J. 1994, 864 F.Supp. 416.

As with Title VII actions, before filing civil suit against employer under ADA, employee must file timely Equal Employment Opportunity Commission (EEOC) charge and receive rigth-to-sue letter. Osborn v. E.J. Brach, Inc., N.D.Ill.1994, 864 F.Supp. 56.

Employee's administrative remedies under the Americans with Disabilities Act (ADA), for employer's alleged failure to reasonably accommodate her handicap, would be deemed exhausted upon her receipt for right-to-sue letter from Texas Human Rights Commission and her submission of letter to court. James v. Texas Dept. of Human Services, N.D.Tex. 1993, 818 F.Supp. 987.

APPENDIX E

§ 794 Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504,

and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(As amended Pub.L. 99-506, Title I, § 103(d)(2)(B), Title X, § 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub.L. 100-259, § 4, Mar. 22, 1988, 102 Stat. 29; Pub.L.100-630, Title II, § 206(d), Nov. 7,1988, 102 Stat. 3312; Pub.L. 102-569, Title I, § 102(p)(32), Title V, § 506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub.L.103-382; Title III, § 394(i)(2), Oct. 20, 1994,108 Stat. 4029.)